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ACCESS ISSUES / CASES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

IN THE MATTER OF:	
MARYLAND ASSEMBLIES, INC. PERRY, FLORIDA	Case No. 89-444128
	WARRANT AND ORDER FOR ENTRY AND INVESTIGATION PURSUANT TO SECTION 3007 OF THE RESOURCE CONSERVATION AND RECOVERY ACT, AS AMENDED, 42 U.S.C §6927, SECTION 308 OF THE CLEAN WATER ACT, AS AMENDED, 33 U.S.C. §1318, SECTION 114 OF THE CLEAN AIR ACT, AS AMENDED, 42 U.S.C. §7414, AND SECTION 11 OF THE TOXIC SUBSTANCES AND CONTROL ACT, AS AMENDED, 15 U.S.C. §2610

TO: J. Scott Gordon, Florida Coordinator for the Waste Compliance Section, United States Environmental Protection Agency, (hereinafter referred to as "EPA"), Region IV, any duly designated officer or employee of the EPA-National Enforcement Investigations Center, any other duly designated officer, employee, or representative of the Administrator of the EPA.

Application having been made by the United States Attorney based upon an affidavit made before me, by J. Scott Gordon on behalf of the EPA for a warrant of entry, inspection, reproduction of records, and sampling to determine compliance of Maryland Assemblies, Inc., (hereinafter referred to as "the premises", and which is an entity more particularly described in the attached Affidavit, which is hereby incorporated by reference) with the Resource Conservation and Recovery Act, the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, as cited above; and, the court being satisfied that there has been a sufficient showing that reasonable legislative or administrative standards for conducting an inspection and investigation have been satisfied;

IT IS HEREBY ORDERED that EPA through its duly designated officer, J. Scott Gordon and any authorized attorney or representative of said Agency is hereby entitled and authorized to have entry upon the premises.

IT IS FURTHER ORDERED that entry, inspection, reproduction of records, and sampling shall be conducted during daylight hours within reasonable limits, and in a reasonable manner.

IT IS FURTHER ORDERED that the warrant shall be for the purpose of conducting an entry, inspection, reproduction of records, photography, and sampling pursuant to the laws cited above consisting of the following activities:

1. Entry to, upon, or through the above described

premises including all buildings, structures, pits, open ground, and other sites where hazardous wastes are, or have been, generated, stored, treated, or disposed of, or transported from.

2. Inspection, sampling, photography, and investigation of the premises.

3. Access to company records shall include, but not be limited to, any record required to be kept under the following federal laws:

42 U.S.C. §6901, et seq., as amended

15 U.S.C. §2601, et seq., as amended

33 U.S.C. §1251, et seq., as amended

42 U.S.C. §7401, et seq., as amended

4. Access to and reproduction of all records (including computer records) pertaining to or relating to hazardous wastes and processes which generate hazardous wastes, wastewater discharge, air emissions, and handling of PCB's or PCB equipment. Any other records which pertain to Maryland Assemblies, Inc., and/or the premises, compliance with the above-cited laws may be reviewed and reproduced.

5. To take any further activities deemed necessary by EPA to adequately inspect and sample the property as authorized by any of the federal laws referenced above in paragraph 3.

IT IS FURTHER ORDERED that if records are reproduced off the premises, (1) any such record so removed shall be

properly receipted for by the representatives of the EPA, (2) Maryland Assemblies Inc., may send one of its employees to accompany the aforementioned representatives of EPA during such reproduction, and (3) such records shall be returned within 72 hours of the time they are first removed from the premises.

IT IS FURTHER ORDERED that the United States of America, EPA, through its duly designated representative or representatives is hereby entitled to and shall be authorized to seal the above described records in their containers, or in containers to be provided, until such records can be copied, provided that (1) sealed records which are necessary for the conduct of the everyday business affairs of Maryland Assemblies, Inc., and/or the premises, shall be reviewed and/or copied and unsealed first, (2) any other records which are sealed shall be reviewed and/or copied and unsealed before other records are examined and/or copied, and (3) the seals placed on the containers which hold the records may be broken only by a person authorized to place the seals or pursuant to court order.

IT IS FURTHER ORDERED that EPA representatives may halt and sample any waste shipments.

IT IS FURTHER ORDERED that a copy of this warrant shall be left at the premises at the time of investigation.

IT IS FURTHER ORDERED that an inventory identifying any material removed from the premises shall be furnished by the

EPA to the owner, operator, or representative of Maryland Assemblies, Inc., and/or the premises.

IT IS FURTHER ORDERED that this warrant shall be valid for a period of 10 days from the date of this warrant.

IT IS FURTHER ORDERED that a prompt return of this warrant shall be made to this court within 15 days from the date hereof, showing this warrant has been executed, and the entry and activity authorized herein has been completed within the time specified.

William C. Hazel Jr
United States Magistrate
September 27, 1989
5:40 P.M.

EXHIBIT D

UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:	No. 87-42M
NATIONAL-STANDARD COMPANY CITY COMPLEX AND LAKE STREET PLANTS NILES, MICHIGAN	AFFIDAVIT IN SUPPORT OF APPLICATION FOR WARRANT FOR ENTRY AND INVESTIGATION PURSUANT TO THE RESOURCE CONSERVATION AND RECOVERY ACT, AS AMENDED BY THE HAZARDOUS AND SOLID WASTE AMENDMENTS OF 1984, 42 U.S.C. §6901 et seq.

I, Carol Ann Witt, being duly sworn, state as follows:

1. I make this affidavit in support of the attached Warrant which is sought pursuant to the authority of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as further amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. §6901 et seq. I base this affidavit upon personal knowledge and upon my review of records in the files of the United States Environmental Protection Agency (U.S. EPA) and the Michigan Department of Natural Resources (MDNR), as well as other records.

2. I am currently employed as a Geologist with the Michigan Unit of the Technical Programs Section of the U.S. EPA, Region V, Chicago, Illinois. I have been with U.S. EPA for two years. I am actively involved in implementing the provisions of RCRA and HSWA. As part of my duties with U.S. EPA, I have performed

approximately fourteen (14) RCRA/HSWA Visual Site Inspections and three (3) RCRA/HSWA Sampling Visits.

3. I received an Associate of Science degree in Science from Triton College in 1980.

4. I received a Bachelor of Science degree in Earth Science from Northeastern Illinois University in 1982.

5. I received a Master of Science degree in Earth Science from Northeastern Illinois University in 1985.

6. National-Standard Company is the owner and operator of two facilities where hazardous wastes are or have been generated, stored, treated, disposed of or transported from. The facilities are authorized to operate under the interim status provisions of RCRA/HSWA. The facilities are both located in Niles, Berrien County, Michigan. The City Complex plant is located at 601 N. Eighth Street. The Lake Street plant is located at 1631 Lake Street.

7. National-Standard Company is seeking permits for the treatment, storage, or disposal of hazardous waste at its facilities. National-Standard Company submitted Part A of its RCRA permit application in November, 1982, and submitted revised Part B applications for the facilities on October 3, 1986. U.S. EPA and MDNR are evaluating whether or not National-Standard's permit applications should be granted.

8. I am responsible for the technical review of the federal permit applications, including assuring that all portions of the federal permit application are complete.

9. Corrective action is required to be included in all permits for facilities where releases of hazardous waste or constituents have occurred from any solid waste management unit. Similarly, corrective action may also be required at any facilities with interim status.

10. The U.S. EPA has developed RCRA Facility Assessment (RFA) Guidance dated October, 1986 for the purpose of enforcing the corrective action provisions of RCRA/HSWA.

11. In accordance with the RFA Guidance, I performed a Visual Site Inspection (VSI) at the National-Standard facilities. I performed VSIs on March 24, 1987 at the City Complex Plant and on March 25, 1987 at the Lake Street Plant.

12. As a result of the VSIs and other information, I determined that there were several Solid Waste Management Units (SWMUs) at the facilities. At the request of National-Standard, I sent a list of the SWMUs at each facility to the Company on April 3, 1987. (Attachment 1).

13. Also as a result of the VSI, I determined that there have been releases of what may be hazardous wastes or constituents from some of the SWMUs.

14. The "releases" are evident from my observations of discolored soil or surface water body sediments, discontinuities in vegetation, and odors. I have photographs of the majority of releases that I could detect visually. (Attachment 3).

15. I believe the "releases" may be comprised of "hazardous wastes or hazardous waste constituents" because they are located in close proximity to units that the company has acknowledged are SWMUs (containing, for example, wastewater treatment sludges from electroplating operations (EPA hazardous waste number F006) and waste that is EP Toxic for lead (D008), both of which are hazardous wastes as defined by Section 1004(5) of RCRA, 42 U.S.C. §6903), or are located in close proximity to units the company has acknowledged contain hazardous substances (including waste that exhibits the characteristic of ignitability (D001), Copper-Cyanide, and F006 and D008) from which a routine, systematic and deliberate discharge may have occurred. The RCRA Facility Assessment Guidance designates these latter discharges as SWMUs.

16. I composed a sampling scheme and notified the company on April 16, 1987 of the type of sample and the parameters to be analyzed for. (Attachment 2).

17. The Sampling Visits were originally set for the week of April 20th, 1987. However, arrangements for the laboratory for sample analysis could not be confirmed, and U.S. EPA

rescheduled the Sampling Visits for the week of May 11, 1987. National-Standard Company informed U.S. EPA that that date was inconvenient. U.S. EPA therefore rescheduled the Sampling Visits for the week of June 15, 1987.

18. I plan to perform a Sampling Visit at the City Complex plant on June 15 and 16, 1987. I plan to perform a Sampling Visit at the Lake Street plant on June 17 and 18, 1987. To perform both Sampling Visits, it is necessary:

1. To bring upon the property for use and to leave upon the property all equipment and vehicles needed for inspection and sampling.

2. To take a maximum of sixty (60) soil, ground water, surface water, and air samples, and wastes, not including equivalent samples provided to the company, at approximately 45 locations as needed to investigate releases or possible releases of hazardous waste or constituents from any units which U.S. EPA designates as Solid Waste Management Units (SWMUs) at the facilities. Such sampling shall include the taking of background samples at the facilities.

3. To package and process such samples for analysis at an off-site laboratory.

4. To take photographs to document the sampling activity.

5. To undertake any other activities to adequately inspect and sample the properties as authorized by Section 3007 of RCRA/HSWA, 42 U.S.C. §6927.

19. National-Standard Company, through its attorney, Mary Ellen Hogan of McDermott, Will & Emery in Chicago, objects to the scope of and questions the basis for the Sampling Visits. In a May 28, 1987 conference call between U.S. EPA and National-Standard Company, National-Standard opposed U.S. EPA's entry.

20. U.S. EPA's Sampling Visits will not significantly disrupt or inconvenience the National-Standard Company's business.

I certify under penalty of perjury that the foregoing is true and correct. Executed on this 12th day of June, 1987.

s/
Carol Ann Witt

Attachment 1 5HS-OLK-15

APR 1987

Express Mail

Mr. Richard Hoessner
Manager, Environmental Control
National-Standard Company
601 N. Eighth Street
Niles, Michigan 49120

RE: Corrective Action
Sampling Visit
National-Standard City Complex
Niles, Michigan
MID 005 069 257

Dear Mr. Hoessner:

This letter is to inform you of the United States Environmental Protection Agency's (U.S. EPA) intent to perform the next stage of the corrective action program under Section 3004 (u) of the Hazardous and Solid Waste Amendments of 1984 (HSWA), and Section 3007 of the Resource Conservation and Recovery Act (RCRA). We are planning on performing a Sampling Visit (SV) at the above referenced site on April 20 and 21, 1987, at 8:00 AM, with our subcontractors Harding Lawson Associates/H and K.W. Brown. Representatives from the Michigan Department of Natural Resources (MDNR) will also attend as technical assistants.

As discussed with Carol Witt of my staff, at the site visit on March 24, 1987, sample type, sampling devices, and laboratory analysis information shall be sent to you as soon as the parameters are finalized. We will transfer the information to you by phone, the week of April 5th, and follow-up with a letter to you. We hope this method will supply you with adequate preparation time for split-sampling.

On March 24, 1987, you also requested a list of identified Solid Waste Management Units (SWMUs) at the site. These include:

1. The RCRA regulated lined surface impoundment,
2. The waste water treatment plant,
3. The underground oil storage tanks,
4. The waste caustic, sulfuric and hydrochloric acid tanks,
5. The pipe-line rupture,
6. The underground gasoline storage tanks,
7. The less than 90 day drum storage area,

8. The steam condensate tank area,
9. The lined hydrochloric acid tanks, and
10. The NPDES discharge.

The product storage in underground tanks is listed because they are covered under the U.S. EPA LUST program, and are an "area of concern".

Photo documentation of the sampling will be necessary. We appreciate the cooperation you have given us regarding cameras on-site, and we will work with you on any confidentiality concerns. We do not anticipate entering into process areas within the plant.

If you have any questions regarding this matter, please contact Carol Witt of my staff, at (312) 886-6146 for assistance. She is the technical monitor concerning corrective action at this site.

Sincerely,

Richard Traub, Chief
TPS, NI Unit

cc: Rett Nelson, ORC ✓
Steve Phillips, HL
Pat Vogtman, TPS
Marian Barnes, HUER
Alan Howard, MDNR
Andrea Schoenrock, MDNR
Nadine Romero, MDNR
Chuck Bikfalvy, MDNR

COPY FOR YOUR
INFORMATION

5HS-JCK-13

03 APR 1987

Express Mail

Mr. Richard Moessner
Manager, Environmental Control
National-Standard Company
601 N. Eighth Street
Niles, Michigan 49120

RE: Corrective Action
Sampling Visit
National-Standard Lake Street
Niles, Michigan
MIT 270 010 549

Dear Mr. Moessner:

This letter is to inform you of the United States Environmental Protection Agency's (U.S. EPA) intent to perform the next stage of the corrective action program under Section 3004 (u) of the Hazardous and Solid Waste Amendments of 1984 (HSWA), and Section 3007 of the Resource Conservation and Recovery Act (RCRA). We are planning on performing a Sampling Visit (SV) at the above referenced site on April 22, 23, and 24, 1987, at 8:00 AM, with our subcontractors Harding Lawson Associates/H and K.W. Brown. Representatives from the Michigan Department of Natural Resources (MDNR) will also attend as technical assistants.

As discussed with Carol Witt of my staff, at the site visit on March 25,1987, sample type, sampling devices, and laboratory analysis information shall be sent to you as soon as the parameters are finalized. We will transfer the information to you by phone, the week of April 5th, and follow-up with a letter to you. We hope this method will supply you with adequate preparation time for split-sampling.

On March 25, 1987, you requested a list of identified Solid Waste Management Units (SWMUs) at the site. These include:

1. The RCRA single lined surface impoundment,
2. The RCRA triple lined surface impoundment,
3. The waste water treatment plant,
4. The old NPDES discharge,
5. The new NPDES discharge,
6. The 36,000 gal. spill,
7. The covered seepage lagoons,
8. The hydrochloric acid tanks,
9. The swales and ditches,
10. The underground oil storage tanks,
11. The solid waste landfill area,

12. The HNO_3 storage tanks,
13. The underground fuel storage tank,
14. The diesel fuel station,
15. The four drum storage areas outside the plant,
16. The two drum storage areas inside the plant,
17. The catch basin,
18. The sump areas,
19. The Cu-Cn storage tanks, and
20. The old equipment storage areas.

The product storage units, swales and ditches are considered as "areas of concern". Underground tanks are listed because they are also covered under the U.S. EPA LUST program.

Photo documentation of the sampling will be necessary. We appreciate the cooperation you have given us regarding cameras on-site, and we will work with you on any confidentiality concerns. We do not anticipate entering into process areas within the plant.

If you have any questions regarding this matter, please contact Carol Witt of my staff, at (312) 886-6146 for assistance. She is the technical monitor concerning corrective action at this site.

Sincerely,

Richard Traub, Chief
TPS, MI Unit

cc: Rett Nelson, ORC
Steve Phillips, HL
Pat Vogtman, TPS
Marian Barnes, HWEB
Alan Howard, MDNR
James Roberts, MDNR
Nadine Romero, MDNR
Chuck Bikfalvy, MDNR

COPY FOR YOUR INFORMATION

Attachment 2

16 APR 1987

5HS-13-JCK

Express Mail

Mr. Richard Moessner
Manager, Environmental Control
National-Standard Company
601 N. Eighth Street
Niles, Michigan 49120

RE: Corrective Action Sampling Visit
National-Standard City Complex
Niles, Michigan
MID 005 069 257

Dear Mr. Moessner:

This letter is to inform you of the sampling medium, parameters, and quantity of samples for split sampling. We plan on being at the site on May 11 and 12, 1987, at 8:00 AM. Our subcontractors Harding Lawson Associates/H and K.W. Brown, and representatives from the Michigan Department of Natural Resources (MDNR) will be in attendance.

Following is a list of information you requested for split-sampling with us:

Sample Medium	Number of Samples	Parameters	Analytical Method
Water	6	Priority Pollutant Metals (PPM)	6010*
		CN	335**
		Fe	6010*
		Hydroquinone	625**
		pH	field
		Temperature	field
		Conductivity	field
Water	5	Organics	8010*
Soil	5	PPM	6010*
		Fe	6010*
		CN	335**
Air	N/A	Organics	HNU meter

Sample Medium	Number of Samples	Parameters	Analytical Method
Water Equip. Blank	2	PPM	6010*
		Fe	6010*
		CN	335**
		Hydroquinone	625**
Water Equip. Blank	1	Organics	8010*
Soil Equip. Blank	1	PPM	6010*
		Fe	6010*
		CN	335**
Field Blank	2	PPM	6010*
		Fe	6010*
		CN	335**
		Hydroquinone	625**
		Organics	8010*
Trip Blank	1	PPM	6010*
		Fe	6010*
		CN	335**
		Hydroquinone	625**
		Organics	8010*

* SW846 Methods
** Standard Methods

We also need: 1) construction details of the unused well, and the underground storage tanks, 2) the location and method of NPDES monitoring, 3) if dedicated equipment is used for ground water monitoring, 4) if purged ground water and/or decontamination liquids may be sent to your waste water treatment plant, and 5) permission to have the sampling vehicle at the sampling location.

Please contact Carol Witt of my staff, at (312) 886-6146 on the information requested, by April 22, 1987. If you have any questions regarding this matter, do not hesitate to call.

Sincerely,

Richard Traub, Chief
TPS, Michigan Unit

cc: J. Huls, S. Phillips, HLA/H
R. Nelson, ORC
M. Barnes, HWEB
P. Vogtman, L. Pierard, TPS
A. Howard, A. Schoenrock, N. Romero, MDNR
C. Bikfalvy, MDNR District
M. Hogan, NS

16 APR 1987

5HS-13-JCK

Express Mail

Mr. Richard Moessner
Manager, Environmental Control
National-Standard Company
601 N. Eighth Street
Niles, Michigan 49120

RE: Corrective Action Sampling Visit
National-Standard Lake Street
Niles, Michigan
MIT 270 010 549

Dear Mr. Moessner:

This letter is to inform you of the sampling medium, parameters, and quantity of samples for split sampling. We plan on being at the site on May 13 and 14, 1987, at 8:00 AM. Our subcontractors Harding Lawson Associates/H and K.W. Brown, and representatives from the Michigan Department of Natural Resources (MDNR) will be in attendance.

Following is a list of information you requested for split-sampling with us:

Sample Medium	Number of Samples	Parameters	Analytical Method
Water	8	Priority Pollutant Metals (PPM)	6010*
		Fe	6010*
		CN	335**
		B	6010*
		pH	field
		Temperature	field
		Conductivity	field
Water	4	Organics	8010*
Water	1	Priority Pollutants	8720*
			8240*
			8270*
			335**
		Fe	6010*
		B	6010*

Sample Medium	Number of Samples	Parameters	Analytical Method
Water	1	Base Neutrals of Priority Pollutants	625** or 8720*
Sediment	1	PPM	6010*
		Fe	6010*
		CN	335**
		B	6010*
Soil	9	PPM	6010*
		Fe	6010*
		CN	335**
		B	6010*
Soil	3	Base Neutrals of Priority Pollutants	625** or 8720*
Soil	4	Priority Pollutants	8720*
			8240*
			8270*
			335**
		Fe	6010*
		B	6010*
Residue	1	PPM	6010*
		Fe	6010*
		CN	335**
		B	6010*
Air	N/A	Organics	HNU meter
Water Equip. Blank	1	PPM	6010*
		Fe	6010*
		CN	335**
		B	6010*
		Organics	8010*

Sample Medium	Number of Samples	Parameters	Analytical Method
Water Equip. Blank	1	Priority Pollutants	8720*
			8240*
			8270*
			335**
		Fe	6010*
		B	6010*
Soil Equip. Blank	1	Priority Pollutants	8720*
			8240*
			8270*
			335**
		Fe	6010*
		B	6010*
Field Blank	2	Priority Pollutants	8720*
			8240*
			8270*
			335**
			8010*
		Fe	6010*
		B	6010*
		Organics	8010*
Trip Blank	1	Priority Pollutants	8720*
			8240*
			8270*
			335**
			8010*
		Fe	6010*
		B	6010*
		Organics	8010*

* SW846 Methods
** Standard Methods

We also need: 1) construction details for the underground storage tanks, 2) the location and method of NPDES monitoring, 3) if dedicated equipment is used for ground water monitoring, 4) if purged ground water and/or decontamination liquids may be sent to your waste water treatment plant, and 5) permission to have the sampling vehicle at the sampling location.

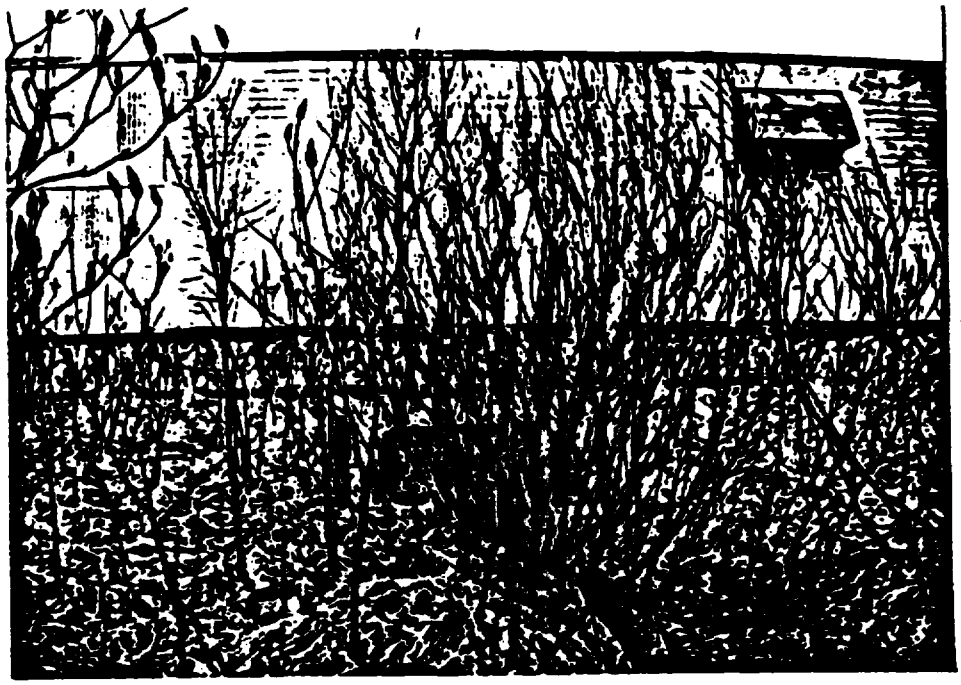
Please contact Carol Witt of my staff, at (312) 886-6146 on the information requested, by April 22, 1987. If you have any questions regarding this matter, do not hesitate to call.

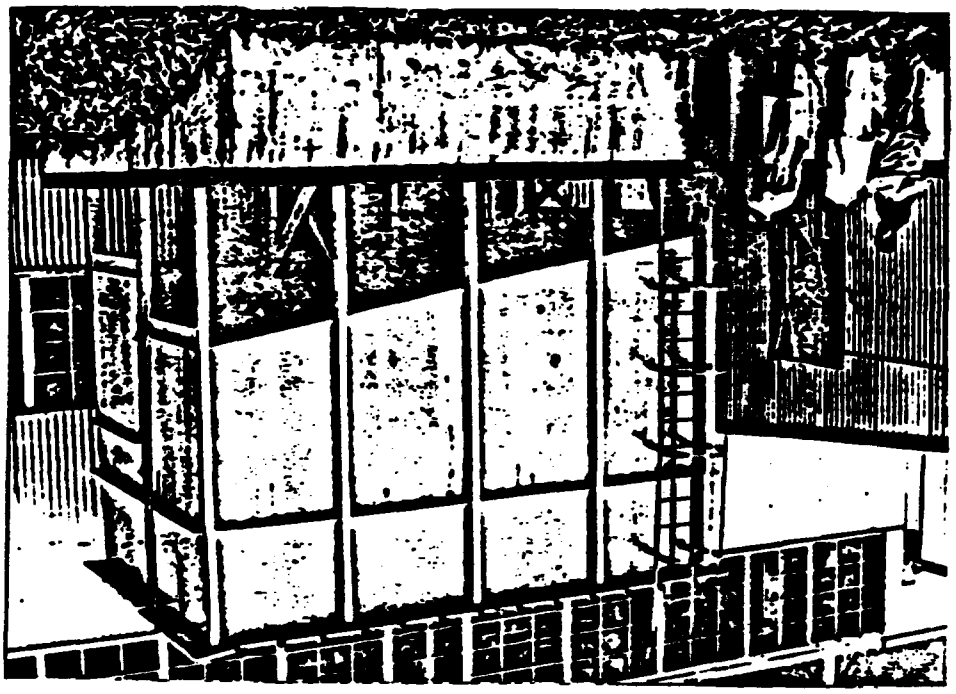
Sincerely,

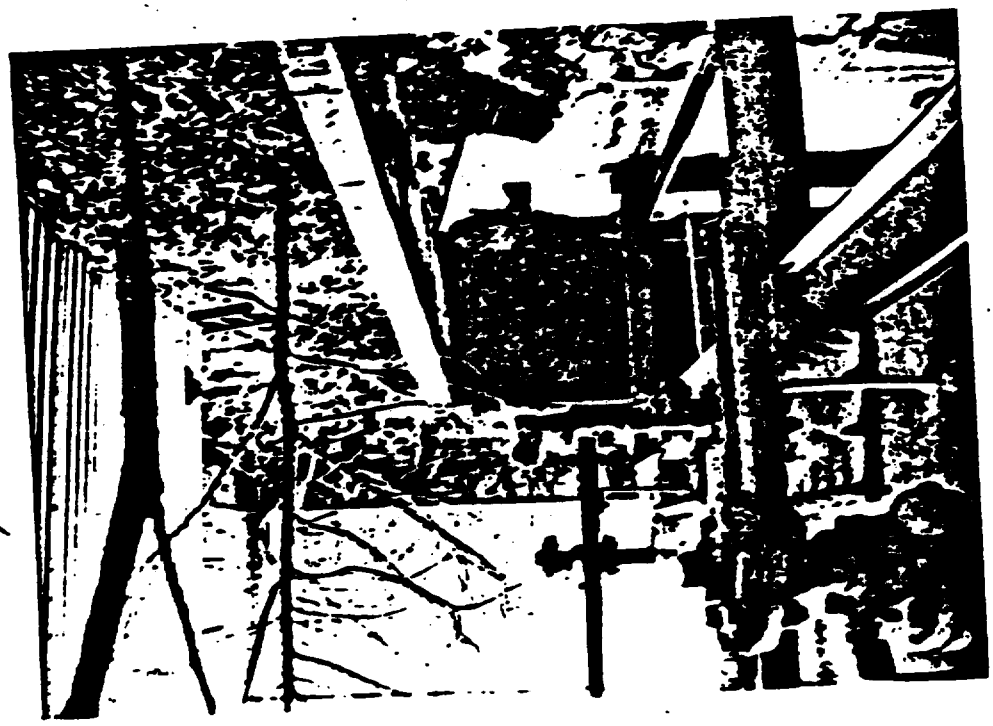
Richard Traub, Chief
TPS, Michigan Unit

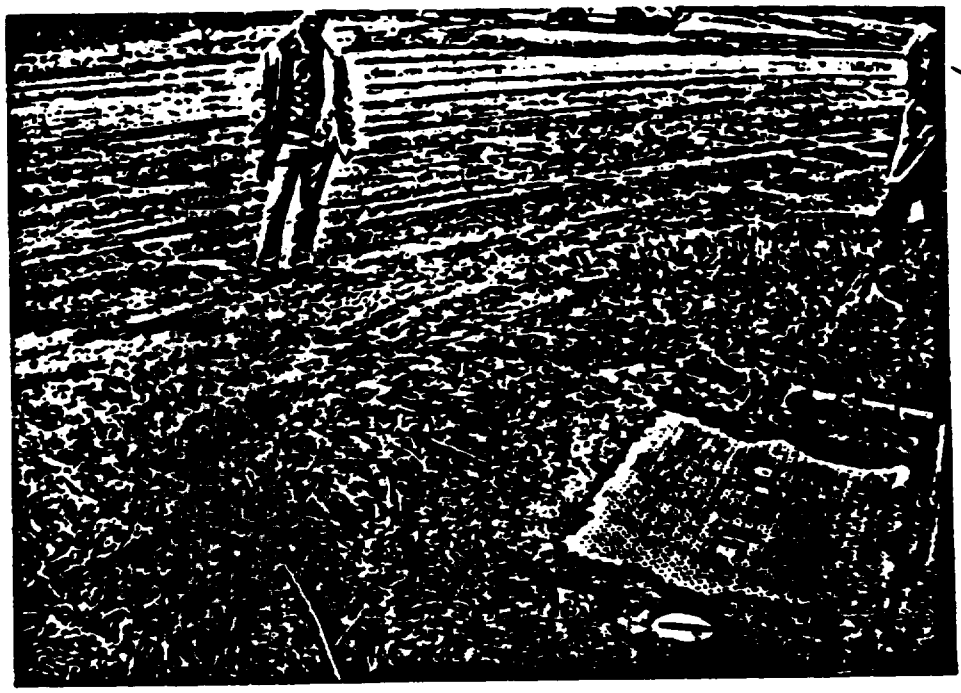
cc: J. Huls, S. Phillips, HLA/H
R. Nelson, ORC
M. Barnes, HWEB
P. Vogtman, L. Pierard, TPS
A. Howard, J. Roberts, N. Romero, MDNR
C. Bikfalvy, MDNR District
M. Hogan, NS

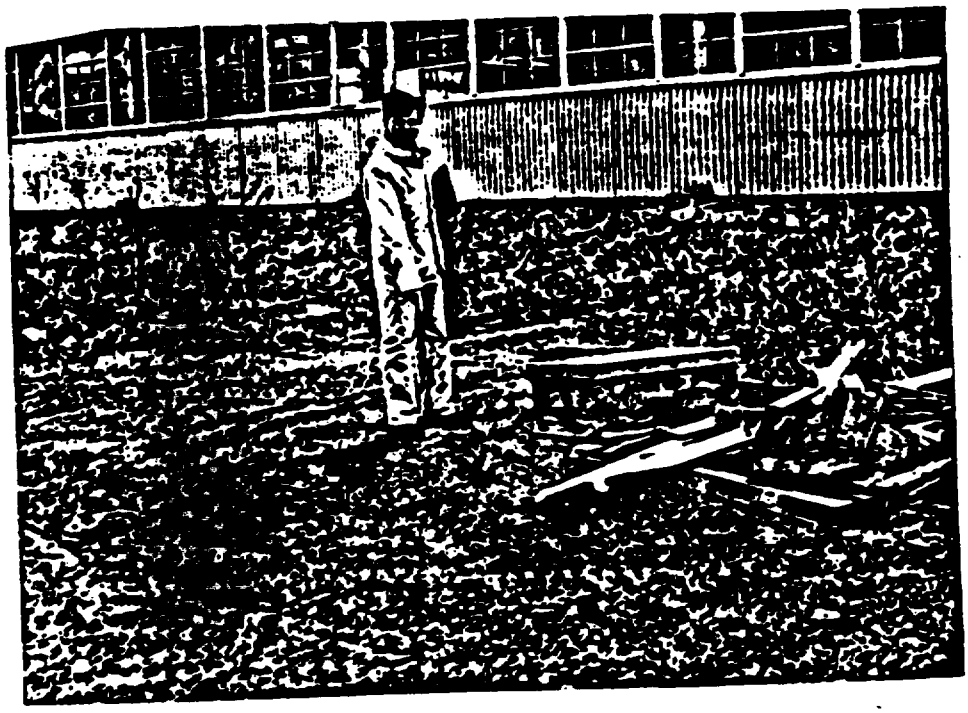
ATTACHMENT 3

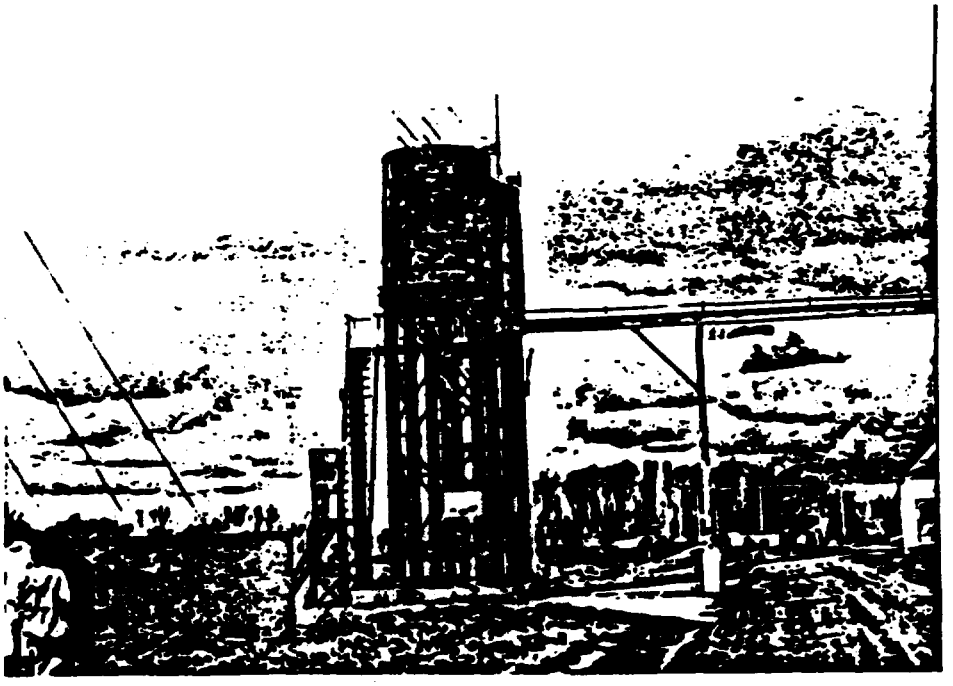


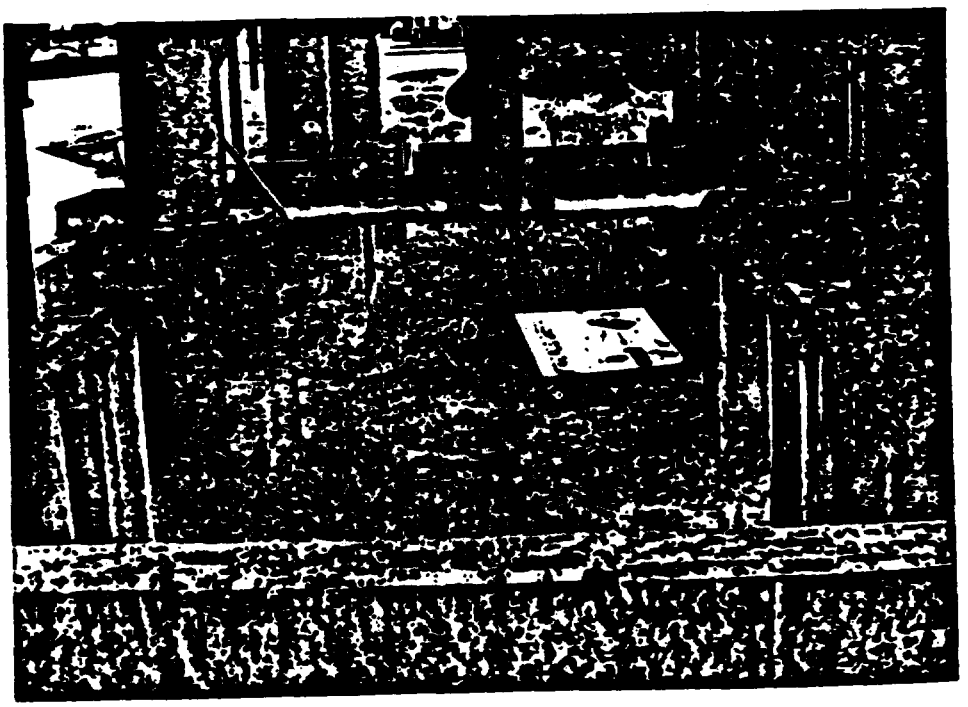


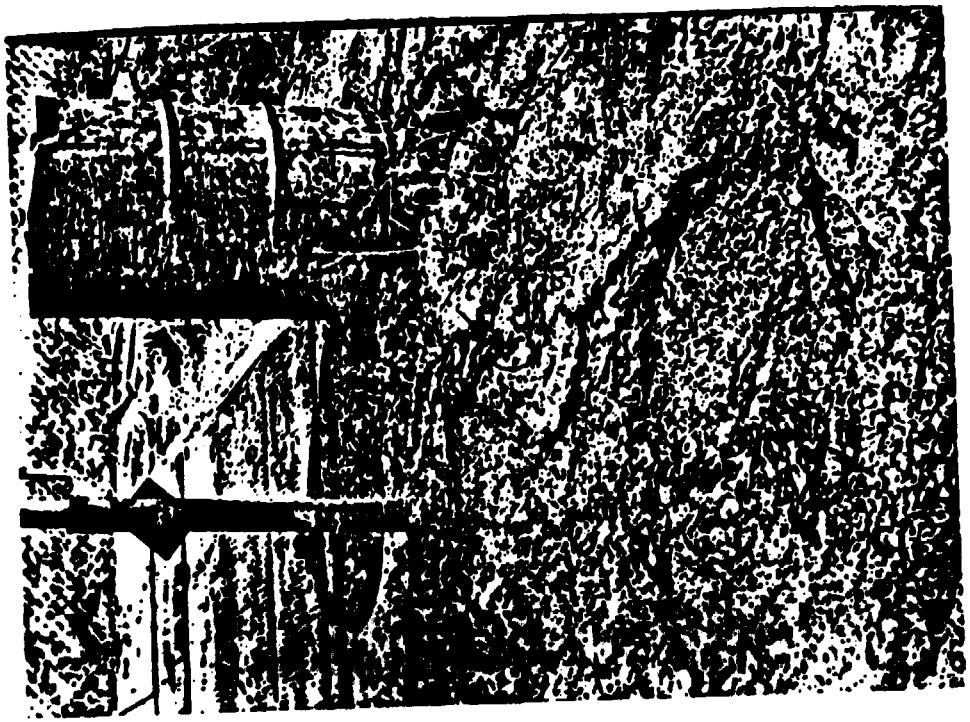


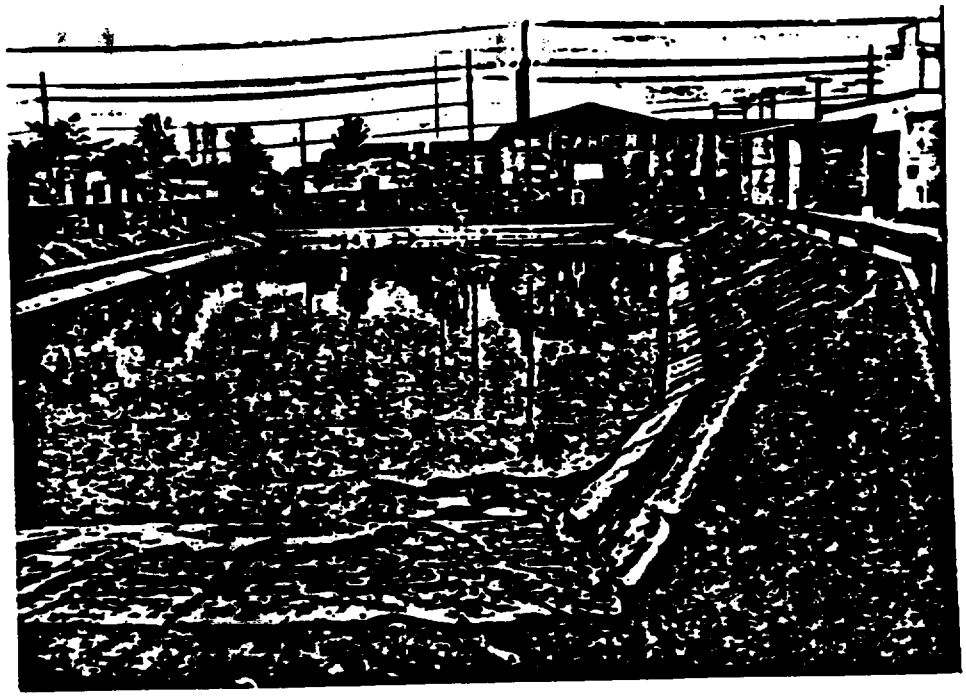


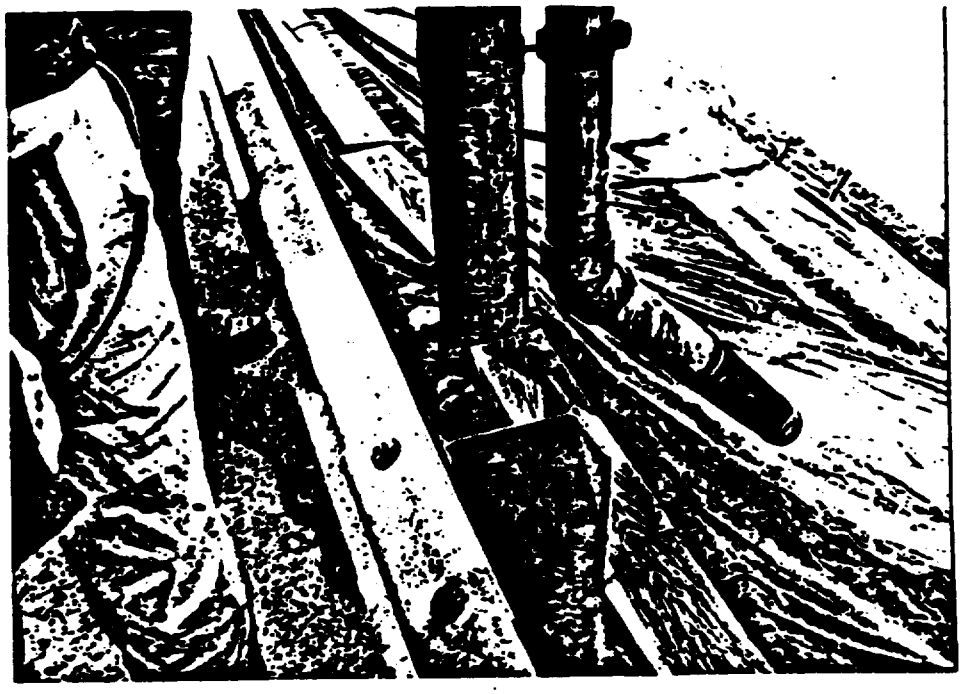


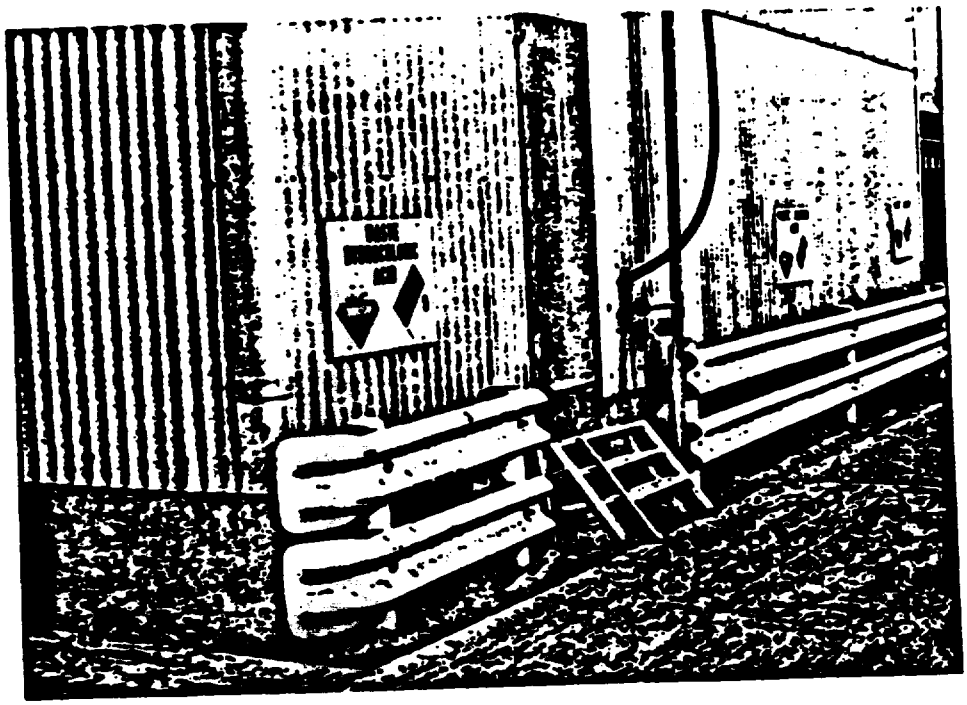


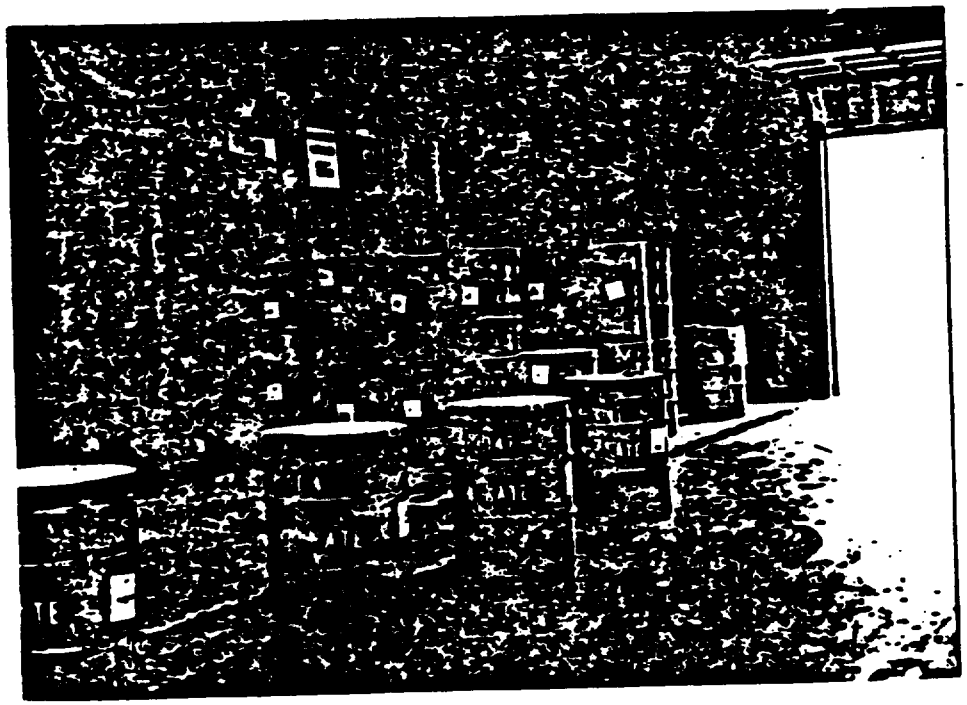


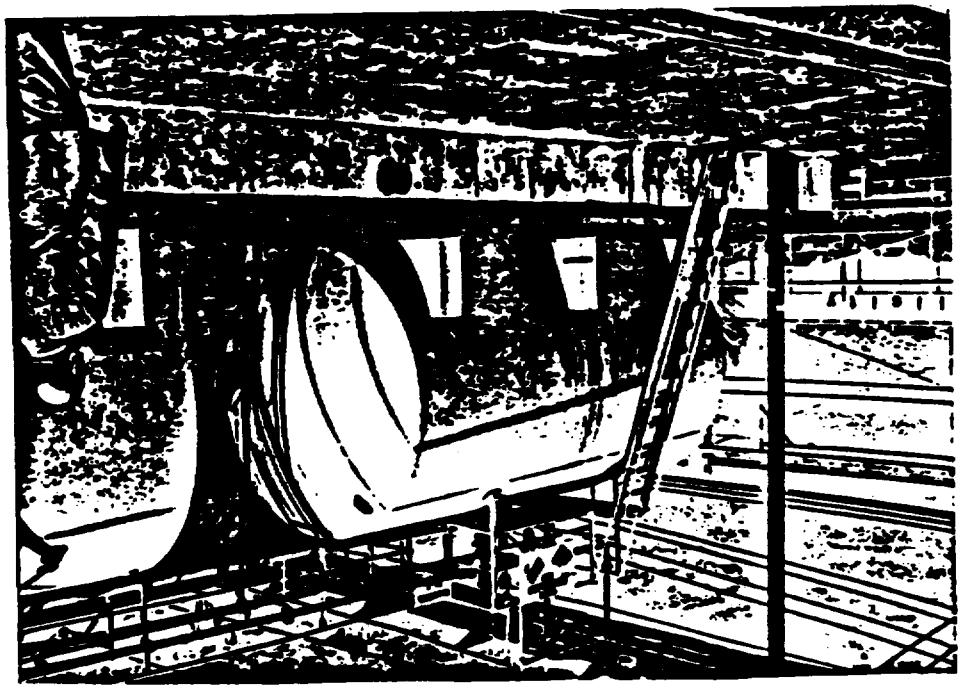












UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:	No. 87-42 M
NATIONAL STANDARD COMPANY CITY COMPLEX AND LAKE STREET PLANTS NILES, MICHIGAN	WARRANT AND ORDER FOR ENTRY AND INVESTIGIATION PURSUANT TO SECTION 3007 OF THE RESOURCE CONSERVATION AND RECOVERY ACT OF 1976, AS AMENDED, 42 U.S.C. §6927

TO: THE UNITED STATES MARSHAL FOR THE WESTERN DISTRICT OF MICHIGAN AND ANY OFFICER, EMPLOYEE, OR DESIGNATED REPRESENTATIVE OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY (U.S. EPA).

An affidavit by Carol Ann Witt, having established that for the purposes of enforcing the provisions of RCRA it is necessary to inspect and obtain samples at the National-Standard Company facilities located at 601 N. Eighth Street (City Complex Plant) and at 1631 Lake Street (Lake Street Plant) in Niles, Michigan; an application by the United States of America, on behalf of the U.S. EPA, having established that the issuance of this warrant is constitutional, and that the right of the U.S. EPA to enter and investigate is authorized by the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976 (RCRA), as further amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. §6901 et seq.; and this Court having found that reasonable grounds exist for issuance of a warrant, IT IS HERERY ORDERED THAT upon service of this Warrant upon National-Standard Company or upon

its duly designated representative, any officers, employees and designated representatives of the U.S. EPA, including the Michigan Department of Natural Resources (MDNR) and their officers, employees and designated representatives, and including U.S. EPA contractors and subcontractors, and the United States Marshal, shall be permitted to enter upon the property described as:

1. All property owned by or in the possession of National-Standard Company located at 601 N. Eighth Street (City Complex plant), City of Niles, Berrien County, Michigan.

2. All property owned by or in the possession of National-Standard Company located at 1631 Lake Street (Lake Street plant), City of Niles, Berrien County, Michigan.

IT IS FURTHER ORDERED that officers, employees and designated representatives of the U.S. EPA, including the MDNR and their officers, employees and designated representatives, and including any duly designated U.S. EPA contractors or subcontractors, and the United States Marshal, shall be authorized and permitted to enter and re-enter the above-described premises during the hours of 7:00 a.m. to 7:00 p.m. to conduct thereon the following activities:

1. To bring upon the property for use, and during the ten (10) working days authorized by this warrant, to leave upon the property, all equipment and vehicles needed for inspection and sampling.

2. To take a maximum of sixty (60) soil, ground water, surface water and air samples, not including equivalent samples provided to the company, at approximately 45 locations as needed to investigate releases or possible releases of hazardous waste or constituents from any units which U.S. EPA designates as Solid Waste Management Units (SWMUs) at the property. Such sampling shall include the taking of background samples at the property.

3. To package and process such samples for analysis at an off-site laboratory.

4. To take photographs to document the sampling activity.

5. To take any further activities deemed necessary by U.S. EPA to adequately inspect and sample the property as authorized by Section 3007 of RCRA/HSWA, 42 U.S.C. §6927.

IT IS FURTHER ORDERED that a copy of this Warrant shall be left at the premises at the time of investigation.

IT IS FURTHER ORDERED that a brief inventory identifying any material removed from the premises shall be furnished by the U.S. EPA to the owner, operator, or representative of National-Standard Company.

IT IS FURTHER ORDERED that the duration of the entry, investigation, and activity authorized by this Warrant shall be of such reasonable length to enable the U.S. EPA to satisfactorily

complete the above-described activities. Entry shall not be permitted for longer than ten (10) working days from the date hereof for purposes of insepection and sampling.

IT IS FURTHER ORDERED that the United States Marshal is hereby authorized and directed to assist officers, employees, and representatives of the U.S. EPA in such manner as may be reasonable and necessary to properly execute this Warrant and all the provisions contained herein.

IT IS FURTHER ORDERED that a prompt return of this Warrant shall be made to this Court within one hundred eighty (180) days from the date hereof, showing this Warrant has been executed, and that the entry and activity authorized herein has been completed within the time specified above.

Dated this _____day of June, 1987.

Stephen W. Kern
United States Magistrate

United States Magistrate

Certified As A True Copy
C. Dale Hyask, Clerk
By L McCartney
Deputy Clerk
U.S. District Court
Western Dist. of Michigan
Date JUN 1[illegible] 1987

RETURN OF SERVICE

I hereby certify that a copy of the within Warrant was served by presenting a copy of the same to _____ an agent of _____ on _____, 1987 at the National-Standard Company facility located at 601 N. Eighth Street (City Complex Plant) in Niles, Berrien County, Michigan.

_____

_____
Official Title

RETURN

Inspection of the establishment described in this Warrant completed on _____, 1987.

_____

INVENTORY OF PROPERTY RECEIVED
PURSUANT TO WARRANT

While conducting the entry and inspection of the National-Standard Company facilities located at 601 N. Eighth Street (City Complex Plant) in Niles, Berrien County, State of Michigan, on _____, 1987. I, _____ seized certain property. The following is an inventory of the property seized:

I hereby and affirm that a recipt for the property was signed by me and left with _____.

_____

_____

RETURN OF SERVICE

I hereby certify that a copy of the within Warrant was served by presenting a copy of the same

to _____ an agent

of _____

on _____, 1987, at the National-Standard Company facility located at 1631 Lake Street (Lake Street Plant) in Niles, Berrien County, Michigan.

_____

_____
Official Title

RETURN

Inspection of the establishment described in this Warrant completed on _____, 1987.

_____

INVENTORY OF PROPERTY RECEIVED
PURSUANT TO WARRANT

While conducting the entry and inspection of the National-Standard Company facilities located at 601 N. Eighth Street (Lake Street Plant) in Niles, Berrien County, State of Michigan, on _____, 1987, I, _____ seized certain property. The following is an inventory of the property seized:

I hereby and affirm that a recipt for the property was signed by me and left with _____.

_____

_____

EXHIBIT C

IN THE UNITED STATES COURT FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:	)	No. 87-42 M
	)	
NATIONAL-STANDARD COMPANY	)	APPLICATION FOR WARRANT FOR
CITY COMPLEX AND LAKE STREET	)	ENTRY AND INVESTIGATION PURSUANT
PLANTS	)	TO THE RESOURCE CONSERVATION
NILES, MICHIGAN	)	AND RECOVERY ACT OF 1976, AS
	)	AMENDED BY THE HAZARDOUS AND
	)	SOLID WASTE AMENDMENTS of 1984,
	)	42 U.S.C. §6901 et seq.

The United States of America, on behalf of the United States Environmental Protection Agency (U.S. EPA), by John A. Smietanka, United States Attorney for the Western District of Michigan, applies to this Court for a warrant authorizing U.S. EPA officials, and their assistants, contractors, and other subordinates, to enter upon land owned and in the possession of National-Standard Company located at 601 N. Eighth Street, Niles Michigan (City Complex Plant) and at 1631 Lake Street, Niles, Michigan (Lake Street Plant), hereinafater referred to as "the facilities," and undertake thereon such inspection and sampling activities as necessary to investigate releases or possible releases of hazardous waste or constituents from any units which U.S. EPA designates as Solid Waste Management Units (SWMUs) in order for U.S. EPA to assess the need for corrective action at the facilities.

The U.S. EPA submits this application pursuant to the Solid Waste Disposal Act, as amended by the Resource

Conservation and Recovery Act of 1976 (RCRA), as further amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. §6901 et seq., and alleges upon information and belief as follows:

The U.S. EPA's authority to inspect and obtain samples is found in Section 3007(a) of RCRA, 42 U.S.C. §6927(a), which reads:

> (a) Access Entry - For purposes of developing or assisting in the development of any regulation or enforcing the provisions of this title, any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes shall, upon request of any officer, employee or representative of the Environmental Protection Agency, duly designated by the Administrator, or upon request of any duly designated officer, employee or representative of a State having an authorized hazardous waste program, furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes. For the purposes of developing or assisting in the development of any regulation or enforcing the provisions of this title, such officers, employees or representatives are authorized--
>
> 1. to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from;
>
> 2. to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes.
>
> Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the sample obtained and if requested a portion of each such sample, equal in volume or weight to the portion retained. If any analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge.

Pursuant to Section 3007 of RCRA, then, officers, employees and representatives of U.S. EPA and the State are authorized to enter any place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from in order to inspect and obtain samples from any person of any hazardous wastes for the purpose of enforcing the provisions of the Act.

B. The National-Standard Company owns and operates two facilities in Niles, Michigan. These facilities are located at 601 N. Eighth Street (City Complex Plant) and at 1631 Lake Street (Lake Street Plant). These facilities are "place[s] where hazardous wastes are or have been generated, stored, treated, disposed of or transported from. (Witt Affidavit at Paragraph 6).

C. National-Standard Company is seeking permits for the handling of hazardous waste at its facilties. Pursuant to Section 3005(a) of RCRA, 42 U.S.C. §6925(a), each person owning or operating an existing facility for the treatment, storage or disposal of hazardous waste must have a permit. National-Standard Company submitted Part A of the RCRA permit application in November, 1982 and submitted revised Part B applications for the facilities on October 3, 1986. U.S. EPA and the Michigan Department of Natural Resources (MDNR) are evaluating whether or not National-Standards permit applications should be granted. (Witt Affidavit at Paragraph 7).

D. Section 3004(u) of RCRA/HSWA provides that:

> (u) Continuing Releases at Permitted Facilities - Standards promulgated under this section shall require, and a permit issued after the date of enactment of the Hazardous and Solid Waste Amendments of 1984 by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subtitle, regardless of the time at which waste was placed in such unit. Permits issued under section 3005 shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

Pursuant to section 3004(u) of RCRA/HSWA, 42 U.S.C. §6924, then, permits issued after the enactment of HSWA shall require corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility. In order to incorporate the required corrective action provisions in the permit, U.S. EPA must enter and inspect the National-Standard facilitiies. (Witt Affidavit at Paragraph 11, 12, 13). Therefore, U.S. EPA's entry and inspection will be done "for the purposes of enforcing the provisions of the Act."

E. National-Standard's facilities have achieved "interim status" until such time as final administrative disposition of the permit is made. See RCRA/HSWA §3005(e), 42 U.S.C. §6925(e).

F. Corrective action may also be required at any facilities with interim status pursuant to RCRA/HSWA §3008(h),

42 U.S.C. §6928(h):

> 1. INTERIM STATUS CORRECTIVE ACTION ORDERS: (1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 3005(e) of this subtitle, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.
>
> 2. Any order issued under this subsection may include a suspension or revocation of authorization to operate under section 3005(e) of this subtitle, shall state with reasonable specificity the nature of the required corrective action or other response measure, and shall specify a time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such person shall be liable to the United States for, a civil penalty in an amount not to exceed $25,000 for each day of noncompliance with the order.

The U.S. EPA's entry and inspection shall be done in order to obtain "information... that there is or has been a release of hazardous waste into the environment from.... [the] facilit[ies]" authorized to operate under interim status. (Witt Affidavit at Paragraphs 6, 11, 12, 13). Therefore, U.S. EPA's entry and inspection will be done "for the purposes of enforcing the provisions of the Act."

G. U.S. EPA's actions for which this warrant is sought include the following:

1. To bring upon the property for use and to leave upon the property all equipment needed for inspection and sampling.

2. To take a maximum of sixty (60) ground water, surface water and air samples, not including equivalent samples provided to the company, at approximately 45 locations, as needed to investigate releases or possible releases of hazardous waste or constitutents from any units which U.S. EPA designates as Solid Waste Management Units (SWMUs) at the facilities. Such sampling shall include the taking of background samples at the facilities.

3. To package and process such samples for analysis at an off-site laboratory.

4. To take any further activity deemed necessary by U.S. EPA to adequately inspect and sample the facilities as authorized by Section 3007 of RCRA /HSWA, 42 U.S.C. §6927.

H. The facilities in question are ongoing businesses. However, no significant disruption or intererence with the business will occur as a result of U.S. EPA activity.

I. Opposition to U.S. EPA's entry and inspection for the purposes set forth in Paragraph (G) has not been rescinded by National-Standard Company. (Witt Affidavit at Paragraph 19). On June 9, 1987, National-Standard Company, by its attorneys, filed a Complaint for Declaratory Relief in the United States District Court for the Northern District of Illinois, Eastern Division, Docket No. 87 C 5165. The Complaint alleges that the sampling scheme proposed by U.S. EPA is unauthorized. U.S. EPA

has not yet responded to the Complaint.

J. Although the U.S. EPA was, and is, entitled to a warrantless entry upon the site under RCRA/HSWA (and the U.S. EPA does not intend to waive such a legal position by this application), in order to assure peaceful acquiescence by the owner of the site to the U.S. EPA action, the U.S. EPA applies for this warrant.

K. The United States Supreme Court dcisions in Camara v. Municipal Court, 387 U.S. 523 (1967) and Marshall v. Barlows Inc., 437 U.S. 307 (1978), provide ample authority for this Court to issue a warrant where a statute, such as RCRA/HSWA, confers a right of entry. See also Mobil Oil Corp. v. E.P.A., 716 F. 2d. 1187 (7th Cir. 1983), Bunker Hill v. EPA, 658 F. 2d. 1280 (9th Cir. 1981) and Accord Public Service Co. of Indiana v. EPA, 509 F. Supp. 720 (S.D. Ind. 1981). The standard for probable cause justifying the issuance of an administrative search warrant, less rigorous than for a search and seizure warrant in a criminal investigation, requires only a showing of either "specific evidence of an existing violation" or "reasonable legislative or administrative standards" for conducting a particular inspection, Marshall v. Barlow's Inc., 436 U.S. 307, 320 (1978). Barlow's reinforced the Court's earlier decision that:

> "For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing

> that reasonable legislative or administrative standards for conducting an inspection are satisfied with respect to a particular establishment." Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

More recently, the Supreme Court stated that "[p]robable cause to issue an administrative warrant exists if reasonable legislative, administrative or judicially prescribed standards for conducting an inspection are satisfied . . . " (emphasis added). Michigan v. Clifford, 464 U.S. 287, 294 n.5, 78 L. Ed. 2d. 477, 484 n. 5 (1984). Therefore, inspections initiated because of legislative or regulatory standards and inspections initiated because of specific evidence are subject to the lower standard.

L. The U.S. EPA has established requisite probable cause, and has shown reasonable legislative and administrative standards, satisfying the requirements set forth in the Barlow, Camara and Clifford decisions, supra, to allow for a warrant to issue.

M. In this case, the U.S. EPA has demonstrated that: (1) the U.S. EPA has reason to believe that there are or have been releases of hazardous waste or constituents from solid waste management units (as identified and described by U.S. EPA) at the facilities (Witt Affidavit at Paragraphs 12, 13, 14, 15); (2) investigation and sampling is necessary and appropriate to enforce the corrective action provisions of RCRA/HSWA (Witt Affidavit at Paragraphs 8, 9, 10, 11); and (3) consent for the

U.S. EPA and its officers, employees, representatives, contractors, and subcontractors has been refused by the owner of the site. (Witt Affidavit at Paragraph 19).

N. U.S. EPA estimates that the inspection and sampling can be accomplished in four (4) working days beginning June 15, 1987. Access is needed to take samples at that time because arrangements for processing and analysis of the samples have already been made with a laboratory the week of June 15, 1987. (Witt Affidavit at Paragraph 18).

A form of warrant is attached to this application.

DATED THIS 12th day of June, 1987.

Respectfully submitted,

John A. Smietanka
United States Attorney

By: s/
Thomas Gezon
Chief Assistant United States Attorney

reaches such statements whether they are made during the initial submission of a claim or during its subsequent investigation.

As to the second *Peres* requirement, it cannot be said that Olsowy was responding to inquiries initiated by the government. It was Olsowy who put in motion the events that led to the interviews with the Secret Service agent. He initiated the contact with the government by filing a claim with Treasury. *See Rodgers*, 466 U.S. at 476–77, 104 S.Ct. at 1944–45 (upholding conviction under section 1001 of defendant who contacted FBI and Secret Service and reported falsely that his wife had been kidnapped and that she was involved in a plot to kill the President). That Treasury chose to refer Olsowy's claim to the Secret Service, which has greater expertise and resources to consider its validity, does not change the fact that the investigation into the allegedly lost check was commenced at Olsowy's behest.

Olsowy also fails to satisfy the third *Peres* requirement: his false statements plainly impaired the Treasury Department's basic function of determining whether he was entitled to a replacement check. In *Peres*, we held that "[i]n a post-arrest criminal investigative setting," false statements to a government investigator cannot be thought to "pervert the investigator's police function." 799 F.2d at 546. This rationale does not apply here, where the Secret Service agent was assisting Treasury in resolving the validity of Olsowy's claim; he was therefore not acting "in a purely 'police' capacity." *United States v. Bush*, 503 F.2d 813, 815 (5th Cir.1974), *quoted with approval in Peres*, 799 F.2d at 544. The agent was acting, at least in part, as an administrator, helping Treasury dispose of Olsowy's claim. *See Peres*, 799 F.2d 545. Olsowy's false statements impaired that function.

B. *Multiplicity*

[3] Olsowy makes two separate arguments that the charges against him are multiplicitous. First, he claims that the three counts of violating section 1001 are multiplicitous with count one, which charges a violation of 18 U.S.C. § 287 (making a false claim upon the United States). Olsowy argues that Congress did not intend section 1001 to provide cumulative punishment for conduct already covered by a more specific section of the criminal code like section 287. This argument is beside the point. Olsowy's section 287 conviction and his section 1001 convictions are not multiplicitous because they cover different facts and circumstances. *Compare United States v. Duncan*, 693 F.2d 971, 975 (9th Cir.1982) ("[t]here is no reason that [a defendant] cannot be charged and convicted under 18 U.S.C. § 1001 simply because another statute is also applicable"), *cert. denied*, 461 U.S. 961, 103 S.Ct. 2436, 77 L.Ed.2d 1321 (1983); *with United States v. Ross*, 570 F.2d 1358, 1363 (9th Cir.1978) (convictions under both 18 U.S.C. § 542 and 18 U.S.C. § 1001 redundant where based on exactly the same utterances).

Olsowy was charged and convicted of two separate wrongs: his submission of a false claim to the Treasury in September 1985, and his false statements made to the Secret Service some five months later. The only thing the two have in common is that they concern the same general subject matter: whether Olsowy had received and endorsed the check. Otherwise, the convictions stand quite independent of each other. *See Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932).

[4] Olsowy raises more serious concerns by arguing that counts two, three and four are multiplicitous because they allege that he made precisely the same denials in response to the same questions posed to him by the Secret Service agent. He argues that the government should not be able to pile on multiple convictions by repeatedly asking the same question to a criminal suspect.

468 U.S. 63, 104 S.Ct. 2936, 82 L.Ed.2d 53 (1984).

While we have not previously addressed this issue,[4] in *Gebhard v. United States*, 422 F.2d 281 (9th Cir.1970), we considered a very similar contention in the context of multiple perjury convictions for repeating the same lie to a grand jury in response to the same question. *Gebhard* reasoned that there was no chance the grand jury could be hindered in its investigation by each repetition of the false utterance. Therefore, we held that the government should not be able to obtain multiple perjury convictions. *Id.* at 289–90.

We hold our reasoning in *Gebhard* applicable here. Olsowy made exactly the same oral denial to the same Secret Service agent twice and then signed a document embodying the very same denial. The repetition of Olsowy's initial false statement did not further impair the operations of the government. Once he misled the agent, repeating the lie adds little or nothing to the harm caused to the Secret Service's inquiry. Therefore, we hold that where identical false statements, in either oral or written form, are made in response to identical questions, the declarant may be convicted only once.

C. *Evidentiary Challenges*

[5] Finally, Olsowy argues that the district court improperly excluded evidence that his eligibility for social security was based on a mental disability and that he had received over-payments from the Social Security Administration, all tending to show his honest confusion as to the state of his account. A trial court's evidentiary rulings will not be disturbed on appeal absent a showing of abuse of discretion. *United States v. Burreson*, 643 F.2d 1344, 1349 (9th Cir.), *cert. denied*, 454 U.S. 847, 102 S.Ct. 165, 70 L.Ed.2d 135 (1981).

The district court gave Olsowy ample leeway in attempting to prove he was confused and made an honest mistake. It allowed testimony from defense witnesses that Olsowy had made several inquiries with the Social Security Administration regarding his account and that he seemed genuinely confused about the account's status. The district judge's decision not to admit the proffered additional evidence was not an abuse of discretion.

Conclusion

We affirm as to counts one and two and reverse as to counts three and four.

4. We have previously upheld multiple counts under section 1001 for submitting separate documents at the same time, *United States v. UCO Oil Co.*, 546 F.2d 833, 838–39 (9th Cir.1976), *cert. denied*, 430 U.S. 966, 97 S.Ct. 1646, 52 L.Ed.2d 357 (1977) and multiple convictions for submitting subsequent documents summarizing earlier documents. *United States v. Bennett*, 702 F.2d 833, 835 (9th Cir.1983).

In the Matter of The Petition of the Administrator, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, for Subpoena Enforcement, Plaintiff-Appellee,

v.

ALYESKA PIPELINE SERVICE COMPANY; George M. Nelson, its President, Defendants-Appellants.

No. 86-4427.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted Aug. 3, 1987.

Decided Jan. 5, 1988.

Environmental Protection Agency sued for enforcement of subpoena requiring Alyeska pipeline services and its president to testify and produce documents as part of investigation of ballast water treatment plant under Toxic Substances Control Act. The United States District Court for the District of Alaska, James M. Fitzgerald, Chief Judge, limited scope of subpoena somewhat and then ordered compliance. Appeal was taken. The Court of Appeals,

Brunetti, Circuit Judge, held that: (1) appeal was not rendered moot even though Alyeska had complied with request; (2) information sought was relevant to investigation under Act; (3) under Act, EPA could investigate merely a suspicion of a violation; and (4) issuance of subpoena under Act was appropriate even if it might subsequently be determined that another environmental law was more appropriate to remedy problem discovered.

Affirmed.

1. Administrative Law and Procedure ⇐681

Health and Environment ⇐25.15(5.2)

Subpoenaed party's appeal from district court enforcement of Environmental Protection Agency subpoena was not rendered moot by virtue of fact that party had complied with requests under subpoena and enforcement order; records still in EPA's possession would have to be returned to party if they were wrongfully subpoenaed, and EPA had served similar subpoenas which had not yet been satisfied, the validity of which would be difficult to contest due to need for promptness.

2. Administrative Law and Procedure ⇐683

Health and Environment ⇐25.15(7)

Whether district court correctly limited scope of judicial inquiry in subpoena enforcement proceeding initiated by Environmental Protection Agency was question of law, reviewable de novo; moreover, application of law to facts was also reviewable de novo since appellate review required consideration of legal concepts rather than essentially factual inquiry.

3. Administrative Law and Procedure ⇐358

Health and Environment ⇐25.5(10)

For purpose of enforcement of Environmental Protection Agency subpoena against Alyeska pipeline services and its president, requests seeking information about any chemical substance or mixture, including oil spills, were properly determined to be relevant to an investigation under the Toxic Substances Control Act, notwithstanding contention that Act only regulates PCBs and "imminently hazardous" chemicals; "imminently hazardous" chemicals are not limited to any particular list of chemicals, but rather any substance or mixture that presents an unreasonable risk of serious or widespread injury to health or environment, and Act is designed to cover regulation of all chemical substances even though several sections of Act specifically address PCBs. Toxic Substances Control Act, § 2 et seq., 15 U.S.C.A. § 2601 et seq.

4. Administrative Law and Procedure ⇐358

Health and Environment ⇐25.15(3.3)

The Environmental Protection Agency was not required to allege that it had suspicion or knowledge of any facts indicating that Toxic Substances Control Act had in fact been violated as prerequisite to seeking enforcement of subpoena issued under Act against Alyeska pipeline services and its president in regard to ballast water treatment plant, notwithstanding claim that EPA was improperly using TSCA to obtain information that could not be obtained under Clean Water Act. Toxic Substances Control Act, § 11(c), 15 U.S.C.A. § 2610(c); Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., as amended, 33 U.S.C.A. § 1251 et seq.

5. Administrative Law and Procedure ⇐358

Health and Environment ⇐25.15(12)

Although Toxic Substances Control Act requires that Environmental Protection Agency resort to other environmental laws for investigative and regulatory authority, if possible, before utilizing Act, enforcement of EPA subpoena issued under Act against Alyeska pipeline services in conjunction with investigation of ballast water treatment plant was nonetheless appropriate, notwithstanding claim that EPA was improperly using Act to obtain information that could not be obtained under Clean Water Act; EPA did not yet know what chemicals it was dealing with, and it was premature to require the Agency to determine which environmental laws would be most appropriate to remedy problem. Toxic Substances Control Act, § 9(b), 15 U.S.C.A. § 2608(b); Federal Water Pollution Control Act Amendments of 1972, § 101 et seq., as amended, 33 U.S.C.A. § 1251 et seq.

Edward J. Shawaker, and John T. Stahr, U.S. Dept. of Justice, Washington, D.C., for plaintiff-appellee.

Robert Sussman, Washington, D.C., for defendants-appellants.

Before GOODWIN, ANDERSON and BRUNETTI, Circuit Judges.

BRUNETTI, Circuit Judge:

The United State Environmental Protection Agency (EPA) sued in federal district court for enforcement of its subpoena requiring that Alyeska Pipeline Services (Alyeska) and Alyeska's president George Nelson testify and produce documents for an EPA investigation conducted pursuant to the Toxic Substances Control Act, 15 U.S.C. § 2601 et seq. (TSCA). Judge Fitzgerald limited the scope of the subpoena somewhat and then ordered compliance. Alyeska failed to obtain a stay of the order pending this appeal and is currently obeying the enforcement order.

Alyeska operates a "ballast water treatment" (BWT) plant at Valdez, Alaska in connection with its operation of the Trans-Alaska pipeline. Oil tankers arrive in Valdez full of ballast water, which is pumped out and replaced with oil at the pipeline terminal. This water is subject to a physical separation process at Alyeska's treatment facility before it is released into Valdez Bay.

When the EPA issued the subpoena at issue in this case, it was also processing Alyeska's application for a renewal of its permit to operate the BWT pursuant to the Clean Water Act (CWA), 33 U.S.C. § 1251 et seq. (1982). The EPA does not have the power to issue subpoenas under the CWA, but does have that power under the TSCA. Alyeska contends that the EPA improperly used the investigatory powers under the TSCA to further its CWA investigation of the BWT plant. The EPA maintains that it is conducting a separate investigation under the TSCA. In particular, the EPA is investigating reported incidents in which tankers dumped contaminated tank washings from other ships as ballast at the Valdez terminal before loading crude oil. These incidents, claim the EPA, are outside the scope of a CWA relicensing investigation because the BWT is not designed (or licensed) to handle water soluble chemical mixtures or solutions that may have been involved in the suspect dumpings.

Discussion

A. REVIEWABILITY

[1] An order of a District Court enforcing an administrative subpoena is final and ripe for review. *Casey v. Federal Trade Commission*, 578 F.2d 793, 798–99 (9th Cir. 1978) (*"Casey"*). Even though Alyeska has complied with EPA requests under the subpoena and enforcement order, this appeal is not moot. First, records still in the government's possession should be returned to Alyeska if they were wrongfully subpoenaed. *See Casey*, 578 F.2d at 796; *Federal Trade Commission v. Browning*, 435 F.2d 96, 97–98 (D.C.Cir.1970). Next, the EPA has served subpoenas, which are similar to the one served on Nelson, on other Alyeska employees. These subpoenas have not yet been satisfied. Because it would be difficult to fully contest the validity of each subpoena in subsequent actions because of the need for prompt response to the subpoenas, the case is "capable of repetition, yet evading review" and is therefore not moot. *See Olagues v. Russoniello*, 797 F.2d 1511, 1516 (9th Cir.1986).

B. APPELLATE STANDARD OF REVIEW

[2] Alyeska argues on appeal that the district court erroneously applied a standard of review too deferential to the EPA Administrator and merely "rubber stamped" the subpoena enforcement request. We hold that the question whether the district court correctly limited the scope of judicial inquiry in the EPA subpoena enforcement proceeding is a question of

law, reviewable de novo in this court. *See United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir). (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). The application of that standard to the facts of this case is also reviewable de novo since appellate review requires consideration of legal concepts rather than an essentially factual inquiry. *McConney*, 728 F.2d at 1204.

C. JUDICIAL REVIEW OF EPA SUBPOENA

An EPA subpoena is not self-enforcing. A recipient of an EPA subpoena may refrain from complying with it, without penalty, until directed otherwise by a federal court order. *See SEC v. Jerry T. O'Brien Corp.*, 467 U.S. 735, 741, 104 S.Ct. 2720, 2724–25, 81 L.Ed.2d 615 (1984). The EPA Administrator is authorized to petition a federal district court to order compliance. 15 U.S.C. § 2610(c).

In considering the subpoena in this case, the district court correctly articulated and applied the Ninth Circuit standard of judicial scrutiny. In *EEOC v. Children's Hospital Medical Center of Northern Nevada*, 719 F.2d 1426 (9th Cir.1983), an en banc panel of this court announced the following test to determine when a court should enforce administrative investigative subpoenas:

> The scope of the judicial inquiry in an EEOC or any other agency subpoena enforcement proceeding is quite narrow. The critical questions are: (1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation.

Id. at 1428 (citing *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 508–09, 63 S.Ct. 339, 342–43, 87 L.Ed. 424 (1943)). If the agency demonstrates the existence of these factors, the court should enforce the subpoena unless the party subpoenaed proves the inquiry is unreasonably overbroad or unduly burdensome. *Id.* (citing *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 217, 66 S.Ct. 494, 509–10, 90 L.Ed. 614 (1946)).

Each prong of the *Children's Hospital* test is met in this case. Although the EPA has no power to subpoena sworn testimony under the CWA, it does under the TSCA. 15 U.S.C. § 2610(c). Alyeska concedes that the EPA has regulatory jurisdiction to investigate its BWT plant under TSCA. [Blue at 40]. The first requirement is thus met. The district court also specifically found that procedural requisites to issuing a subpoena have been satisfied. [Memo at 13–14]. Alyeska does not contest this point on appeal.

[3] Finally, the district court considered whether specific requests for documents in the subpoena are relevant to an investigation under the TSCA. [Memo at 14–17]. Alyeska argued below, as it does on appeal, that requests seeking information about any chemical substance or mixture, including oil spills, are outside the scope of a TSCA investigation, since that Act only regulates PCBs and "imminently hazardous" chemicals. The term "imminently hazardous chemical substance or mixture" is not limited to any particular list of chemicals. The term "imminently hazardous chemical substance or mixture" is defined to mean a substance or mixture that presents an unreasonable risk of "serious or widespread" injury to health or the environment which is likely to result before the EPA has a chance to promulgate a final rule under TSCA 2606(f), 15 U.S.C. § 2606(f)(1982). Although several sections of the TSCA specifically address PCBs, the Act is designed to cover the regulation of all chemical substances. *Environmental Defense Fund, Inc. v. Environmental Protection Agency*, 636 F.2d 1267, 1271 (D.C.Cir.1980). The district court thus correctly sustained the EPA's argument that the documents requested are relevant to a TSCA investigation.

D. IMPROPER PURPOSE

Although Alyeska concedes that the EPA has regulatory jurisdiction to investigate its BWT plant under the TSCA, it claims that the subpoena was issued for an improper purpose and that the district court failed to review the EPA's purpose. District courts should enforce administrative subpoenas if the evidence sought is not plainly incompetent or irrelevant to any lawful purpose of the agency. *Children's Hospital*, 719 F.2d at 1429 (citing *Endicott Johnson Corp.*, 317 U.S. at 509, 63 S.Ct. at 343). But it is clear that the district court did consider this claim, as it stated that the "heart of the controversy" was Alyeska's contention that the "EPA is circumventing the law by using TSCA to attain testimony otherwise unattainable under the Clean Water Act." [Memo at 5]. The district court limited the scope of the subpoena, finding that certain requests were not relevant to any lawful purpose under the TSCA. [Memo at 14–17].

The district court considered the EPA's claim that it was investigating Alyeska's operations under TSCA and noted that the "EPA provides this court with no basis in fact for justifying their suspicion that Alyeska processes, uses or disposes of PCBs or imminently hazardous chemical substances." [Memo at 11]. The court additionally found that Alyeska's representation that "it does not dispose of chemical substances in violation of TSCA" to be uncontroverted. [Memo at 11]. Alyeska incorrectly argues that these findings require a conclusion that the subpoena was issued for an improper purpose.

[4] An "independent regulatory administrative agency has the power to obtain the facts requisite to determining whether it has jurisdiction over the matter sought to be investigated." *Federal Maritime Comm'n v. Port of Seattle*, 521 F.2d 431, 434 (9th Cir.1975). An administrative agency, unlike parties relying on the judicial discovery process, need not first allege a violation of the law before it can investigate. Alyeska cites three cases [Blue at 41] for the proposition that "a district court must carefully scrutinize the agency's purported justification when the party resisting a subpoena has raised a 'substantial question' as to the propriety of the agency investigation." The three cases, *EEOC v. K-Mart Corp.*, 694 F.2d 1055, 1066 (6th Cir.1982), *EEOC v. Bay Shipbuilding Corp.*, 668 F.2d 304, 312–13 (7th Cir.1981), and *EEOC v. South Carolina National Bank*, 562 F.2d 329, 332 (4th Cir.1977), all involve enforcement of EEOC subpoenas, which in most respects should be enforced to the same degree as other administrative subpoenas. *Cf. Children's Hospital*, 719 F.2d at 1428 (scope of judicial inquiry for EEOC or other agency subpoena enforcement proceeding is narrow). There is, however, one important difference, however: Congress specifically limited the EEOC's subpoena power by requiring that subpoenas may be issued only in connection with an investigation of a charge and must be relevant to that charge. 42 U.S.C. § 2000e–8(a). Thus, while the "investigatory powers of the EEOC should be interpreted broadly", "the subpoena cannot be so broadly stated as to constitute a 'fishing expedition.'" *E.g. K-Mart*, 694 F.2d at 1066. Unlike the statute in the cases cited above, 15 U.S.C. § 2610(c) imposes no requirement that subpoenas issue only to investigate discrete charges of violations of the law. Rather, the EPA "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43, 70 S.Ct. 357, 364, 94 L.Ed. 401. The district court judge was therefore correct in his view that "the EPA need not allege that it has a suspicion or has knowledge of any facts indicating that the law has been violated."[1] [Memo at 12].

[5] Finally, Alyeska seeks to bolster its "improper purpose" theory with the argument that TSCA was intended by Congress only to fill in gaps left in the statutory scheme and that the EPA must resort to

1. The record shows that the EPA did have a suspicion or knowledge of facts indicating that the law has been violated in this case. Charles Hammel notified the EPA in April, 1985, that he intended to file a citizen's suit against Alyeska for illegally discharging toxins into Valdez Bay. [Memo at 3.] Although Mr. Hammel alleged that the dumping violated the Clean Water Act and Alyeska's NPDES permit, the EPA had the authority to investigate the dumping incident under all applicable environmental laws, including the TSCA.

other statutes for investigative and regulatory authority, if possible, before utilizing the TSCA. [Blue at 25–26]. The legislative history cited by Alyeska indicates that Congress was concerned about laws administered by other regulatory agencies rather than forcing the EPA to "pigeon hole" investigations under particular statutes.[2] Congress gave the EPA Administrator the authority to decide which environmental law is appropriate to investigate individual cases:

> *Laws administered by the Administrator.*—The Administrator shall coordinate actions taken under this chapter with actions taken under other Federal laws administered in whole or in part by the Administrator. If the Administrator determines that a risk to health or the environment associated with a chemical substance or mixture could be eliminated or reduced to a sufficient extent by actions taken under the authorities contained in such other Federal Laws, the Administrator shall use such authorities to protect against such risk unless the Administrator determines, *in the Administrator's discretion*, that it is in the public interest to protect against such risk by actions taken under this chapter. This subsection shall not be construed to relieve the Administrator of any requirement imposed on the Administrator by such other Federal laws.

15 U.S.C. § 2608(b) (emphasis added). The statute thus requires resort to other environmental laws only if the EPA has already determined that other laws would suffice. Since the EPA doesn't even know (but is attempting to find out) what chemicals it is dealing with in this case, it is premature to require the EPA to determine which environmental laws are most appropriate to remedy the problem. The subpoena, though, is relevant to determining whether there is a problem that may be remedied under the TSCA.

E. FURTHER LIMITATIONS ON THE SCOPE OF THE SUBPOENA

The district court limited the scope of the subpoena, refusing to enforce requests for documents relevant to discharges at sea or in foreign countries and tankers that have no connection with the Valdez terminal as irrelevant to a legitimate purpose. We reject Alyeska's appeal for further limitations on the scope of the subpoena because, as we discussed *supra*, all remaining portions of the subpoena are relevant to lawful inquiry under a TSCA investigation.

Conclusions

In reviewing the EPA's petition for enforcement of its subpoena, the district court applied the correct legal standard of review and properly rejected Alyeska's complaint that the EPA was using the TSCA subpoena for an improper purpose. The subpoena, as limited by the district court, contains only requests relevant to a lawful purpose under the TSCA. Accordingly, we

AFFIRM.

2. S.R.Rep. No. 698, 94th Cong., 2d Sess. 23, *reprinted in* 1976 U.S. Code Cong. & Admin. News 4491, 4513 (1976) states:

> SECTION 9—RELATIONSHIP TO OTHER LAWS
>
> This section is intended to minimize overlap and duplication between this act and other Federal laws while assuring protection from environmental and health dangers.
>
> Subsection (a) deals with the action the Administrator is to take when he determines that a law administered by another agency could be used to prevent or sufficiently reduce an unreasonable risk to health or the environment presented by a chemical substance or mixture. In such a case the Administrator is to request that agency to (1) issue an order declaring whether or not such a risk is presented, and (2) if an order is issued declaring that an unreasonable risk is presented, to determine if the risk may be prevented or sufficiently reduced under the law administered by that agency. The agency is to respond to a request from the Administrator within 90 days and publish its findings and conclusions in the Federal Register.
>
> Subsection (b) directs the Administrator to use the authorities under other laws he administers to prevent or reduce risks to health or the environment presented by chemical substances or mixtures unless he determines that such risks may more appropriately be protected against under this act.
>
> * * * * * *
>
> Subsection (d) directs the Administrator to consult and coordinate his activities under this act with the Secretary of Health, Education, and Welfare and the heads of other appropriate Federal agencies in order to achieve maximum enforcement of this act while imposing the least burden of duplicative requirements on those subject to the act. The Administrator is to report annually to the Congress on these efforts.
>
> * * * * * *

UNITED STATES of America, Plaintiff-Appellee,

v.

Michael TOBIAS, Defendant-Appellant.

No. 85-5255.

United States Court of Appeals, Ninth Circuit.

Argued Aug. 5, 1986.

Submitted Dec. 17, 1987.

Decided Jan. 6, 1988.

Defendant was convicted in the United States District Court for the Southern District of California, Earl B. Gilliam, J., of espionage and theft of Government property, and he appealed. The Court of Appeals, Reinhardt, Circuit Judge, held that: (1) cryptographic cards used by Navy to code and decode top secret messages were tangible property within meaning of theft of Government property statute; (2) denial of defendant's motion for disclosure of grand jury records was harmless error, if any, where defendant was subsequently convicted; and (3) denial of defendant's motion for disclosure of illegal surveillance was supported by affidavit sworn by responsible Government official who had personal knowledge of fact at issue which specifically denied allegations.

Affirmed.

1. Larceny ⇐6

Cryptographic cards used by Navy to code and decode top secret messages transmitted from ships to sea were tangible property, and taking of cards could thus be prosecuted under statute prohibiting theft or conversion of Government property. 18 U.S.C.A. § 641.

2. Criminal Law ⇐1166(10.10)

Denial of defendant's motion for disclosure of grand jury records sought by defendant in order to determine whether grand jury was lawfully constituted and supervised, and whether quorum of grand jurors considered evidence and voted to indict, was harmless error, if any, where defendant was subsequently convicted of crimes charged in indictment.

3. Criminal Law ⇐627.8(5)

Denial of defendant's motion for disclosure of illegal surveillance was supported by affidavit sworn by responsible Government official with personal knowledge of facts at issue which specifically denied allegations of illegal surveillance.

Joan P. Weber, San Diego, Cal., for plaintiff-appellee.

Mark F. Adams, San Diego, Cal., for defendant-appellant.

Appeal from the United States District Court for the Southern District of California.

Before ANDERSON, PREGERSON and REINHARDT, Circuit Judges.

REINHARDT, Circuit Judge:

Michael Tobias was convicted of espionage and theft of government property. Tobias appeals, claiming that the trial court erred by denying his motion for judgment of acquittal, refusing to order the production of certain grand jury records, and denying his motion for additional disclosures regarding electronic surveillance. We affirm.

I. FACTS

On August 12, 1984, Secret Service Special Agent Ronald Luzania received a telephone call from an unidentified caller. The

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-1833

NATIONAL-STANDARD COMPANY,

Plaintiff-Appellant,

v.

VALDAS V. ADAMKUS, as Regional Administrator of the United States Environmental Protection Agency, LEE M. THOMAS, as Administrator of the United States Environmental Protection Agency, HARDING-LAWSON ASSOCIATES, and H. and K.W. BROWN,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 87 C 5165—Paul E. Plunkett, *Judge.*

ARGUED NOVEMBER 10, 1988—DECIDED JULY 17, 1989

Before COFFEY, RIPPLE, and KANNE, *Circuit Judges.*

RIPPLE, *Circuit Judge.* This case involves Environmental Protection Agency (EPA) inspections of two facilities owned by National-Standard Company (National-Standard) in Niles, Michigan. In its original declaratory judgment action, the appellant challenged whether the Resource Conservation and Recovery Act (RCRA), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), 42 U.S.C. §§ 6901 *et seq.*, authorizes EPA to inspect the

National-Standard facilities. The district court upheld EPA's inspection authority, and granted the agency summary judgment. It also denied National-Standard's discovery motion. We now affirm.

I.
BACKGROUND

National-Standard is a Delaware corporation that manufactures wire products at its Lake Street and City Complex facilities located in Niles, Michigan. National-Standard's manufacturing process generates, and the company stores, materials such as hydrochloric acid, sulfuric acid, and alkaline wastes. These by-products are within the RCRA definition of "hazardous waste." The statute defines hazardous waste as:

> a solid waste, or combination of solid wastes, which because of its quantity, concentration or physical, chemical, or infectious characteristics may—
>
> (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or
>
> (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5).[1] As required by section 6925(a), National-Standard applied to EPA for a permit for the treat-

[1] In the briefs, the parties consistently refer to particular provisions of RCRA, as amended. In this opinion, however, any references to statutory sections shall be to Title 42 of the United States Code. The corresponding relevant enactments are as follows:

RCRA	U.S.C.
§ 1004(5)	42 U.S.C. § 6903(5)
§ 3004(u)	42 U.S.C. § 6924(u)
§ 3005(a)	42 U.S.C. § 6925(a)
§ 3007(a)	42 U.S.C. § 6927(a)

ment, storage, and disposal of the hazardous wastes it generated. *See* 40 C.F.R. § 270 [hereinafter TSD permit]. At present, its application remains pending, so that National-Standard's facilities currently are operating under "interim status." 42 U.S.C. § 6925(e)(1). Interim status facilities are required to handle hazardous wastes as if operating under a permit. *Id.* (Persons having applied for a hazardous waste disposal permit "shall be treated as having been issued such permit until such time as final administrative disposition of such application is made."). As part of the process of obtaining a permit, corrective action must be taken with regard to any releases of hazardous wastes. Interim status facilities that experience hazardous waste releases are also subject to corrective action. *Id.* at §§ 6924(u), 6928(h).

On March 24 and 25, 1987, EPA officials visited the facilities and performed visual site inspections. During that tour, the officials determined that there were several "solid waste management units" (SWMUs) at each facility and that corrective action would be necessary. On April 3, EPA formally notified National-Standard that it was planning a sampling visit at National-Standard's facilities as the next stage of the corrective action program required under sections 6924(u) and 6927. *See* Letters from Richard Traub to Richard Moessner (Apr. 3, 1987) [hereinafter Notification Letters]; Vol.I, R.1 at Ex. 1-A, 1-B. In the Notification Letters, EPA stated that it wanted to conduct a hazardous waste inspection and collect samples to determine the nature of any corrective action required at National-Standard's facilities before granting the company a permit to store hazardous wastes. The Notification Letters also stated that EPA contractors (defendants-appellees Harding-Lawson Associates and K.W. Brown & Associates, Inc.) were to assist with the sampling, and that representatives of the Michigan Department of Natural Resources would observe the inspection. Finally, the Letters identified thirty SWMUs at the Lake Street and City Complex facilities that would be targeted by the inspection team.

National-Standard refused to consent to the inspection. It protested the breadth of EPA's intended sampling, and stated that section 6924(u) did not authorize the "fishing expedition" proposed by EPA. It also alleged that many of the proposed sampling sites were not SWMUs.[2] *See* Letters from Mary Ellen Hogan to T. Leverett Nelson (May 11, 1987), Vol.I, R.1 at Ex. 2-A, 2-B; Appellant's Br. at 38-39. Soon afterwards, National-Standard filed a declaratory judgment action in the district court for the Northern District of Illinois. Vol.I, R.1. The complaint sought declaratory relief on the ground that EPA lacked authority

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[2] Neither RCRA nor the regulations promulgated thereunder define "*solid* waste management unit" (SWMU). The regulations do define a "*hazardous* waste management unit" as follows:

> 'Hazardous waste management' unit is a contiguous area of land on or in which hazardous waste is placed, or the largest area in which there is significant likelihood of mixing hazardous waste constituents in the same area. Examples of hazardous waste management units include a surface impoundment, a waste pile, a land treatment area, a landfill cell, an incinerator, a tank and its associated piping and underlying containment system and a container storage area. A container alone does not constitute a unit; the unit includes containers and the land or pad upon which they are placed.

40 C.F.R. § 260.10.

The district court formulated its own definition of SWMU by substituting the word "solid" for "hazardous" in the above regulation. Mem. Op. at 3 n.3. Neither party challenges this definition. The district court claimed support for this interpretation from EPA's promulgation of final regulations under the HSWA, which state:

> The term 'solid waste management unit' includes any unit at the facility 'from which hazardous constituents *might* migrate, irrespective of whether the units were intended for the management of solid and/or hazardous wastes.' H.R. Rep. No. 198, 98th Cong., 1st Sess., Part 1, 60 (1983) . . . EPA believes that the term 'unit' at least encompasses . . . 'containers, tanks, surface impoundment, waste piles, land treatment units, landfills, incinerators, and underground injection wells.' 47 F.R. 32281 (July 26, 1982).

50 Fed. Reg. 28,712 (July 15, 1985); Mem. op. at 3 n.3.

under section 6924(u) to inspect the National-Standard facilities and that any inspections allowed under sections 6924(u) and 6927(a) were limited to hazardous wastes specifically listed in the Code of Federal Regulations. *Id.* Venue was grounded on the location in Chicago of the EPA Regional Administrator charged with overseeing RCRA enforcement at the facilities.

Three days after the filing of the complaint, EPA applied for and obtained ex parte an administrative search warrant to inspect the National-Standard facilities from the United States magistrate in the district court for the Western District of Michigan (the district that encompasses Niles). Attached to the warrant application was the affidavit of Ms. Carol Witt, an EPA geologist. Ms. Witt had been part of the EPA visual site inspection team that visited the National-Standard facilities on March 24th and 25th; as a result of this inspection, she had determined that there were several SWMUs at each facility. She further stated that, based on her observations of discolored soil, surface water body sediments, discontinuities in vegetation, and odors, there had been releases of what may be hazardous wastes or constituents from some of the SWMUs. She believed the releases may have been hazardous wastes because they were near known SWMUs containing ignitable solid wastes, copper cyanide, lead, or waste water treatment sludges from electroplating operations. Ms. Witt proposed taking no more than sixty solid waste, water, and air samples, including background samples, at the facilities. Vol.II, R.10 at Ex. B. On July 15, 1987, three days after obtaining the warrant, EPA commenced execution.

On June 16, 1987, National-Standard responded, filing in the district court for the Western Dictrict of Michigan: (1) a complaint seeking preliminary and permanent injunctive relief barring EPA from continuing the inspection and from using the inspection results; and (2) an emergency motion to quash the administrative search warrant and to transfer venue of all Michigan proceedings to the district court for the Northern District of Illinois. Vol.II, R.1

at Ex. A & Ex. B. After conferring with the district judge presiding over the pending declaratory judgment action in the Northern District of Illinois, the chief judge of the Western District of Michigan ordered all proceedings transferred to Illinois. *National-Standard Co. v. Adamkus*, No. 87-42-M (W.D. Mich. June 16, 1987) (order); Vol.II, R.1 at Ex. C.

Eventually, all matters were consolidated in the Northern District of Illinois. Upon making a finding of relatedness, the district court joined the Michigan-initiated proceedings with the original declaratory judgment action. The court also entered an agreed order whereby EPA could continue its inspection and take samples from the National-Standard facilities, but could not obtain the results of the analyses from EPA's contract laboratories. National-Standard then filed an amended complaint seeking declaratory relief, an order quashing the administrative search warrant, and preliminary and permanent injunctive relief as to the results of the first inspection. Vol.II, R.30. This complaint, when read in its totality, requests a broad adjudication as to the inspection powers of EPA with respect to a facility such as National-Standard's.

The district court later granted EPA's motion to deny National-Standard's discovery requests and granted summary judgment in favor of EPA and its contractor co-defendants. *National-Standard Co. v. Adamkus*, No. 87 C 5765 (N.D. Ill. Mar. 23, 1988) (memorandum opinion and order) [hereinafter Mem. op.]. The court also vacated the agreed order—releasing the sampling results to EPA. However, on the basis of the record before us, it appears that no EPA corrective action has been ordered since it received the sampling results.

II.

THRESHOLD ISSUES

A. Jurisdiction

Halfway through its oral argument before this court, EPA questioned, for the first time, whether the transfer order by the district court for the Western District of Michigan was properly granted. Specifically, EPA argued that Federal Rule of Criminal Procedure 41(a), in conjunction with the civil action transfer statute, 28 U.S.C. § 1404(a), requires this court to conclude that the transfer was incorrect and that, consequently, we cannot consider the propriety of the warrant's issuance. Supplemental briefs were submitted by both EPA and National-Standard. We hold that EPA has waived this issue. A thorough review of the record reveals no attempt by EPA or its co-appellees to object to the transfer when it was made. Never once in all its pleadings or briefs before the various courts in this case did EPA ever question the validity of the transfer from Michigan to Illinois. The EPA did not seek review[3] of the transfer order in the Sixth Circuit. *See Illinois Tool Works, Inc. v. Sweetheart Plastics, Inc.*, 436 F.2d 1180, 1187-88 (7th Cir.), *cert. dismissed*, 403 U.S. 942 (1971); *Purex Corp. v. St. Louis Nat'l Stockyards Co.*, 374 F.2d 998, 1000 (7th Cir.), *cert. denied*, 389 U.S. 824

[3] When, as here, the legal authority of the district court to transfer a case is at issue, mandamus has been considered an appropriate remedy. *See Van Dusen v. Barrack*, 376 U.S. 612, 615 n.3 (1964); *see also Chesapeake & O. R. Co. v. Parsons*, 307 F.2d 924, *reversed on other grounds*, 375 U.S. 71 (1962); *Chicago, R.I. & P. R. Co. v. Igoe*, 212 F.2d 378 (7th Cir. 1954); *Dairy Indus. Supply Ass'n v. La Buy*, 207 F.2d 554 (7th Cir. 1954); 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3855 at 475 (1986). On the other hand, as Judge Wisdom noted for the Eleventh Circuit in *Roofing & Sheet Metal Servs. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 987 (11th Cir. 1982), "there is substantial disagreement among the circuits, and some apparent confusion within the respective circuits, concerning the appropriate role of mandamus as a remedy for abuses of discretion by district courts in deciding motions under § 1404(a)."

(1967); *see also Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 985-87 (11th Cir. 1982). Nor did it move for retransfer of the matter in the district court for the Northern District of Illinois. *See Purex*, 374 F.2d at 1000; *Linnell v. Sloan*, 636 F.2d 65, 67 (4th Cir. 1980); *see generally* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3846 at 359-60 (1986) ("The transfer order is not subject to review by the transferee court or its court of appeals .... But an order of transfer is not res judicata. A motion to retransfer the action may be made in the transferee court and the ruling on that motion is reviewable in the court of appeals to which the transferee court is responsible.") (footnotes omitted). Consequently, we shall not allow this afterthought to be argued before us now.

B. Mootness

Next, EPA submits that National-Standard's entire appeal is now moot in light of EPA's having obtained the results of the sampling analyses after the district court's agreed order was vacated. A moot case is one that fails to present a "live" controversy to the adjudicating court. *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980). With regard to establishing mootness, a "heavy" burden of proof rests on the party suggesting mootness—EPA. *See County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). EPA has failed to carry its burden.

As noted above, this appeal is from a district court judgment denying National-Standard's broad request for declaratory and injunctive relief. Due to the vacation of the agreed order, EPA now possesses the results of the search and may order corrective action at the National-Standard facilities. The facts of this case thus closely resemble those addressed by this court in *Donovan v. Fall River Foundry Co.*, 712 F.2d 1103 (7th Cir. 1983). In *Fall River*, an employer appealed a district court's holding that an administrative search warrant obtained by the Occupational Safety and Health Administration (OSHA) was not

violative of the employer's fourth amendment rights by reason of alleged overbreadth. Although the warrant had been executed, this court reviewed its scope and the subsequent search of the employer's records. In addressing the agency's claim that mootness precluded such review, the court said:

> Initially, it is important to note that, despite the limited search of the Fall River facility OSHA conducted in late 1982 or early 1983, this case is not moot. . . . [S]hould citations issue against Fall River, pursuant to the limited search, Fall River might contest them on the theory that they resulted from a search that violated the Fourth Amendment because of the overbreadth of the warrant.

712 F.2d at 1111. *Accord Matter of Kulp Foundry Co., Inc.*, 691 F.2d 1125, 1129 (3d Cir. 1982) (case moot *because* modified warrant had been fully executed and no citations issued). *Contra B&B Chemical Co., Inc. v. United States EPA*, 806 F.2d 987, 990-91 (11th Cir. 1986) (rejecting Third and Seventh Circuits' approach). Indeed, this case presents a stronger case against mootness than *Fall River*. Under the statutory scheme at issue here, there is every probability that EPA will act on the results of the samples obtained by the administrative search warrant. Under the comprehensive scheme of RCRA, discussed further *infra*, interim status hazardous waste facilities like those at National-Standard's Niles plants are subject to the same level of stringent regulation as permitted hazardous waste facilities. *See generally* 42 U.S.C. § 6295(i); D. Stever, Law of Chemical Regulation and Hazardous Waste §§ 5.06[2][c], 5.06[2][d][i][B] (1988). Therefore, as a result of this search, EPA will take one of the following steps: (1) order immediate corrective action under section 6928(h); (2) consider the results and nevertheless grant a TSD permit; or (3) consider the results but not order immediate corrective action, and then later deny a TSD permit and order corrective action.

This court's holding in *United States v. Kis*, 658 F.2d 526 (7th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982), on which EPA relies heavily, is not to the contrary. In *Kis*, we held that taxpayers' compliance with an Internal Revenue Service request for handwriting exemplars mooted their appeal as to the enforceability of government summonses for those exemplars. 658 F.2d at 532-33. In so ruling, this court agreed with earlier rulings of six other circuits on the precise question. *Id.* at 532. We said that:

> The [taxpayers] contend that this court could grant them relief by declaring the summons to be invalid and by suppressing the handwriting exemplars and any evidence obtained as a result of their submission. Such a ruling, however, would ignore the well-established rule that questions of suppression should not be considered until the time when the Government seeks to use the evidence. *It would be highly speculative so to rule at this stage, for there is no guarantee that the Government will ever seek to use that evidence.* It may never even bring any subsequent actions against the [taxpayers].

Id. at 533 (footnote omitted) (emphasis supplied). There is no necessity for such speculation here. The statutory scheme makes further EPA action virtually inevitable. In the legislative history of the 1984 Hazardous and Solid Waste Amendments to RCRA, Pub. L. 98-616, 98 Stat. 3221 (1984), Congress made clear that past inadequate efforts by EPA in promulgating regulations, permitting facilities, and law enforcement necessitated the tightened statutes. *See* H. Rep. No. 98-198, Part I, 18-20, 44-46, *reprinted in* 1984 U.S. Code Cong. & Admin. News 5576-79, 5603-05. Congress has required EPA to take affirmative action in overseeing hazardous waste at interim status facilities.[4] Thus, to fulfill its congressional mandate, EPA

[4] 42 U.S.C. § 6927(e). The HSWA also ordered EPA to promulgate regulations establishing inspection frequency. Pub. L. 98-616 at § 231. *See generally* D. Stever, *supra*, at § 5.09[2][a][iv] & n.669.

must "use the evidence" (i.e. review the sampling analyses from this search) either to issue a TSD permit or to order corrective action.

Besides this initial use of the sampling results, it is virtually certain that EPA will likely again have to reinspect and resample the National-Standard facilities in order to guarantee the company's compliance. Congress requires those facilities granted a TSD permit to undergo mandatory inspections at least once every two years. 42 U.S.C. § 6927(e)(1). The situation presented here is thus "capable of repetition, yet evading review." *See Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). There is, given the statutory scheme, "a 'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (per curiam); *see also Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (question of constitutionality of pretrial restrictive order not moot even after the expiration of that order upon jury impaneling); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam). EPA's initial search is the starting point of an ongoing regulatory relationship between National-Standard and EPA to ensure the safe storage and eventual disposal of hazardous wastes at the Lake Street and City Complex facilities. Under that scheme, inspections are not merely possible, but highly likely.

III.
WARRANT ANALYSIS

A. EPA's Statutory Authority

The primary issue raised by the appellant before this court is whether RCRA authorizes EPA to inspect the National-Standard facilities. National-Standard submits that sections 6924(u) and 6927(a) bar these EPA inspections. EPA responds that RCRA clearly authorizes inspection searches like the ones conducted here, and alternatively

submits that EPA's interpretation[5] of section 6927 is reasonable and thus merits deference by this court.[6] EPA also submits that section 6924(u)[7] authorizes the inspection of National-Standard's Niles facilities. We hold that the RCRA inspection provision relied upon by the magistrate—section 6927(a)—authorizes EPA's entry and inspection of National-Standard's facilities, and thus we affirm the judgment of the district court.[8]

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[5] *See* "Inspection Authority Under Section 3007 of RCRA," EPA Memorandum from Francis S. Blake to J. Winston Porter (Apr. 17, 1986); R.44 at Ex. A.

[6] EPA Br. at 35. EPA cites *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.11 (1984) (stating that "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding"). In *Chevron*, the Court determined that Congress had not spoken to the issue in question and that EPA regulations creating the "bubble" concept were reasonable interpretations of the Clean Air Act.

[7] Section 6924(u) states:

> (u) Continuing Releases at Permitted Facilities.—Standards promulgated under this section shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit. Permits issued under section 6925 of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

42 U.S.C. § 6924(u).

[8] National-Standard submits that EPA's reference to section 6924(u) in the Notification Letters prevents it from inspecting and sampling at locations *other than* SWMUs because that section addresses solely EPA authority to order corrective action for releases from SWMUs. We agree with the district court, however, that

(Footnote continued on following page)

The starting point of statutory interpretation is the now-familiar two-part test delineated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). There, a unanimous Supreme Court explained how a court is to evaluate an agency's interpretation of a statute it administers. First, the court must determine "whether Congress has spoken directly to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-43 (footnote omitted). *See also American Mining Congress v. United States EPA*, 824 F.2d 1177, 1182 (D.C. Cir. 1987) ("This inquiry focuses first on the language and structure of the statute itself. If the answer is not yielded by the statute, then the court is to look to secondary indicia of intent, such as the measure's legislative history."). Second, in cases where Congress' intent is not clear or where "Congress has not directly addressed the precise issue in question . . . [,] the question for the court is whether the agency's answer is based on a permissible interpretation of the statute." *Chevron*, 467 U.S. at 843 (footnotes omitted). We turn, then, to the first step and examine the language employed by Congress. *See CBS, Inc. v. FCC*, 453 U.S. 367, 377 (1981); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979).

Section 6927(a) provides:

> (a) Access entry
>
> For purposes of developing or assisting in the development of any regulation or enforcing the provi-

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[8] *continued*

this argument is based on a "faulty premise." Mem. op. at 24. EPA's invocation of section 6924(u) in the Notification Letters does not limit its authority to inspect and sample under section 6927(a), discussed *infra*. Under that provision, EPA's inspection authority is not restricted to SWMUs, but rather, it may inspect any area in which hazardous wastes are or have been stored.

> sions of this chapter, any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes shall, upon request of any officer, employee or representative of the Environmental Protection Agency, duly designated by the Administrator, or upon request of any duly designated officer, employee or representative of a State having an authorized hazardous waste program, furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes. For the purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter, such officers, employees or representatives are authorized—
>
> (1) to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from;
>
> (2) to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes.
>
> Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the sample obtained and if requested a portion of each such sample equal in volume or weight to the portion retained. If any analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge.

42 U.S.C. § 6927(a).

National-Standard submits that the plain language of this provision explicitly limits any authorized inspections solely to "inspect and obtain samples from any person of

any such *wastes* and samples of any *containers or labeling* for such wastes." EPA thus exceeded its authority in broadening its search to the collection of samples that, according to National-Standard, "relate to" hazardous wastes. Appellant's Br. at 16. In National-Standard's view, section 6927(a) permits EPA inspections only when a given facility identifies itself as possessing hazardous wastes, at which point EPA may sample from any SWMU those wastes, or their containers, or container labels only. Furthermore, those hazardous wastes which may be sampled are to be defined by the hazardous waste facility, not EPA. *Id.* at 17.[9]

We cannot accept such an interpretation of section 6927(a). We agree with the district court that this interpretation would "emasculate EPA's ability to pursue the broad remedial goals of RCRA." Mem. op. at 22. Like the district court, we believe that "[t]he main purpose of an inspection and sampling visit is to detect the presence of hazardous wastes. If EPA could not inspect an area unless it knew hazardous wastes were stored there, EPA would be rendered effectively powerless." *Id.* EPA's broad inspection authority is tempered by its need to show probable cause and obtain an administrative search warrant, discussed *infra*, when a hazardous waste facility owner, such as National-Standard, does not consent to the inspection.

Section 6927(a) inspections are authorized "[f]or the purposes . . . of enforcing the provisions of this chapter." Chapter 82 of Title 42 of the United States Code, 42 U.S.C. §§ 6901-91i, provides EPA with a broad mandate for enforcing the national policy of treating, storing, and disposing of hazardous wastes "so as to minimize the present and future threat to human health and the environ-

[9] National-Standard submits that: "Neither the statute nor the regulations allow U.S. EPA's subjective beliefs to be a determining factor. In fact, the person who produces the material has by regulation the responsibility for determining whether it is a hazardous waste. 40 CFR § 262.11." Appellant's Br. at 17.

ment." 42 U.S.C. § 6902(b). The Notification Letters' reference to a particular provision that authorizes *corrective action* orders for hazardous waste releases from SWMUs—section 6924(u)—does *not* limit EPA's ability to *inspect and sample* from areas other than SWMUs. EPA's inspection and sampling authority derives from the broad language in section 6927(a), which empowers the agency to enforce the entire RCRA scheme, not just a particular provision. In determining the material that EPA may sample under section 6927(a), Congress significantly chose the broad, general term "hazardous waste" defined in section 6903(5) (set out in Part I) rather than "hazardous waste identified or listed under this subchapter," employed in other provisions. *See, e.g.*, 42 U.S.C. §§ 6924(a), 6925(a). This broad range of materials Congress intended to subject to sampling under section 6927(a) was demonstrated in the HSWA legislative history:

> EPA's authority under these provisions [RCRA sections 3007 and 7003] is not limited to wastes that are 'identified or listed' as hazardous, but rather includes all wastes that meet the statutory definition of hazardous wastes.

H. Rep. 198, 98th Cong., 1st Sess. 47 (1983); *see* EPA Br. at 28 n.15.

Finally, National-Standard's interpretation of section 6927(a) as being limited to situations of proven actual releases is also incorrect. A similarly narrow interpretation of the Clean Water Act was rejected by this court in *Mobil Oil Corp. v. EPA*, 716 F.2d 1187 (7th Cir. 1983), *cert. denied*, 466 U.S. 980 (1984). In *Mobil*, this court refused to quash an administrative search warrant for the sampling of untreated waste water. The court interpreted the Clean Water Act and held that:

> These provisions of [the Clean Water Act inspection provision] leave no doubt that the Congress that enacted that Section was firmly convinced that the interest of permit holders such as Mobil in keeping

> secret information about the pollutants in its waste water is not entitled to protection.

716 F.2d at 1190. Likewise, section 6927(a) clearly vests broad authority in EPA to inspect and sample any facility at which the agency has probable cause to believe that violations of the statute are occurring.

B. Issuance of Warrant

National-Standard next argues that, despite EPA authority to inspect and sample pursuant to an administrative search warrant, such a warrant was granted improperly here.[10] The appellant claims three flaws in the warrant: (1) not enough probable cause was shown; (2) the warrant was overbroad; and (3) it should not have been issued ex parte. Upon review, however, we determine that none of the alleged flaws exist.

1. Probable Cause

The appellant asserts that Ms. Witt's affidavit provided insufficient probable cause for the issuance of the warrant. In order for an administrative warrant to issue, (1) there must be specific evidence of an existing violation, or (2) the search must be part of a general neutral administrative plan. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320-21 (1978). Here, the warrant was issued on the former basis—specific evidence of a RCRA violation. National-Standard recognizes that administrative warrants do not require the same degree of probable cause as do criminal warrants. *See Weyerhauser Co. v. Marshall*, 592 F.2d 373, 377 (7th Cir. 1979); *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335 (7th Cir. 1979); *West Point-Pepperell, Inc. v. Donovan*, 689 F.2d 950 (11th Cir. 1982). Nevertheless, it urges that Ms. Witt's affidavit does not satisfy even these standards.

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[10] Other than the jurisdictional and mootness claims discussed *supra*, EPA raises no procedural challenges to our consideration of this issue.

To determine whether this warrant passes probable cause muster, we shall compare the quantum of evidence presented to the reviewing magistrate to that considered by other courts reviewing the issuance of administrative search warrants. *See Gilbert & Bennett*, 589 F.2d at 1342. In *Weyerhauser*, this court rejected as insufficient an affidavit for an OSHA search that merely stated a generalized summary of the one complaint that the agency received. 592 F.2d at 378 & n.6. In *Gilbert & Bennett*, this court upheld a very detailed affidavit in support of an OSHA search that listed explicit conditions and complaints. 589 F.2d at 1339-42. The court also noted that in determining whether probable cause exists, " 'the need for inspection must be weighed in terms of [the] reasonable goals of code enforcement.' " *Id.* at 1338 (quoting *Camara v. Municipal Ct.*, 387 U.S. 523, 535 (1967)); *see also Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980). In *West Point-Pepperell*, the Eleventh Circuit found sufficient probable cause in an affidavit based on nearly seventy interviews. 689 F.2d at 958.

Here, we conclude that, like the affidavit reviewed in *Gilbert & Bennett*, Ms. Witt's detailed affidavit satisfies the level of probable cause necessary for the issuance of an administrative search warrant. As outlined *supra*, Part I, the affidavit explained the various known hazardous wastes at the National-Standard facilities and the affiant's observations at earlier visual site inspections. *See* R.44 at Ex. D. Additionally, the affidavit included photographs of what appear to be dead vegetation, leaking barrels, etc. "In no way was the warrant application mere boilerplate," concluded the district court. Mem. op. at 16. We agree. This specificity, together with Congress' express desire for strong enforcement of the RCRA statute, *supra*, clearly constituted sufficient probable cause for the issuance of the administrative search warrant.

2. Overbroad Warrant

National-Standard also argues that the warrant purports to grant EPA permission to perform inspection and sampling beyond that specifically described in RCRA. *See* 42 U.S.C. § 6927(a). In particular, it submits that "background samples" authorized by the warrant are not authorized by RCRA. Appellant's Br. at 36. National-Standard has not asserted that procurement of such background sampling incurred any specific problems, such as undue interference with plant operations; indeed, an examination of a map of the facilities confirms that no sampling locations were obstructive.

The Supreme Court's discussion in *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986), is persuasive guidance. There, Dow claimed that EPA had no authority to use aerial photography to implement its statutory power for site inspection under the Clean Air Act. The Court held that:

> Congress has vested in EPA certain investigatory and enforcement authority, without spelling out precisely how this authority was to be exercised in all the myriad circumstances that might arise in monitoring matters related to clean air and water standards. *When Congress invests an agency with enforcement and investigatory authority, it is not necessary to identify explicitly each and every technique that may be used in the course of executing the statutory mission.* . . .
>
> *Regulatory or enforcement authority generally carries with it all the modes of inquiry and investigation traditionally employed or useful to execute the authority granted.*

476 U.S. at 233 (emphasis supplied).

Background sampling is a mode of "inquiry and investigation traditionally employed" in the type of scientific sampling authorized by section 6927(a). Accordingly, we agree with the district court that "[t]he power to take

background samples is implicit in EPA's power to detect releases of hazardous wastes." Mem. op. at 23. There is "no indication in the statute that Congress intended to foreclose EPA from taking control or background samples in the ordinary course of scientific investigation." *Id.* Therefore, in light of our determination that the administrative search warrant was properly limited in scope (location, duration, and number of samples) to meet the *Dow* standard, we hold that the warrant was not overbroad.

3. Ex Parte

To persuade this court that use of an ex parte proceeding was improper, National-Standard relies almost exclusively on the district court opinion in *In re Stauffer Chemical Co.*, 14 Env't Rep. Cas. (BNA) 1737 (D. Wyo. 1980), *aff'd*, 647 F.2d 1075 (10th Cir. 1981). In *Stauffer*, the district court quashed an EPA administrative search warrant for the Clean Air Act inspection of a phosphate plant. It said that:

> The use of an *ex parte* proceeding to obtain the Administrative Warrant was, *under the circumstances of this case*, improper and violated principles of fundamental fairness. This is a case of first impression. EPA's counsel . . . was at all times fully aware that Stauffer would challenge the Agency's authority to force entry by private contractors onto plant premises. For that reason, fundamental principles of justice and fair play dictated that Stauffer be allowed to contest the issue before a warrant was issued and the entry effectuated. However, instead an ex parte procedure was issued by EPA in this case, without notice of any kind to Stauffer. . . . Although *ex parte* warrants may be proper under other circumstances, we feel that in view of the novel aspects of this case, notice and an opportunity to be heard should have been provided by the EPA's attorney.

Stauffer, 14 Env't Rep. Cas. (BNA) at 1741 (emphasis supplied).[11] National-Standard submits that, like the Stauffer Company, it voiced its intention to mount a legal challenge to EPA's authority to inspect, no exigent circumstances existed, National-Standard had been cooperative in following the permit procedure, and these provisions of RCRA had not yet been interpreted by this court.

National-Standard's argument fails to recognize that ex parte proceedings are the normal means by which warrants are obtained in both criminal and administrative actions, and do not, in and of themselves, evidence bad faith. *See Midwest Grower's Co-Op v. Kirkemo*, 533 F.2d 455, 464 (9th Cir. 1976); *In re Stanley Plating Co., Inc.*, 637 F. Supp. 71, 72 (D. Conn. 1986). In *Stanley Plating*, the court held that the pendency of a civil proceeding that had been initiated against the polluter by EPA did not prevent the agency from invoking its search and sampling power accorded by section 6927(a); the discovery constraints of Rule 26 of the Federal Rules of Civil Procedure did not dictate otherwise. 637 F. Supp. at 72.[12]

EPA's inspection authority in section 6927(a), together with the admitted presence of hazardous waste at the facilities, an EPA scientist's belief that a release of hazardous waste had occurred, and satisfactory probable cause, preclude any argument that it was improper for EPA to apply for and obtain an ex parte administrative search warrant. The mere pendency of a related civil action does not automatically preclude EPA's use of other authorized

[11] In *Stauffer*, the company had made clear that it did not contest the right of government officials to enter the premises but did contest EPA's contracting inspection responsibilities to private contractors.

[12] Similarly, the Ninth Circuit in *Midwest Growers* reasoned that the Interstate Commerce Commission's use of an ex parte warrant did not demonstrate bad faith, despite the court's ruling that the agency's belief in its authority was erroneous. 533 F.2d at 464 & n.21. As we discussed *supra*, EPA here correctly concluded that it possessed statutory authority.

law enforcement techniques such as the ex parte application for an administrative search warrant. *See Stanley Plating*, 637 F. Supp. at 72.

CONCLUSION

EPA was properly authorized by section 6927(a) to perform an inspection and sampling visit at the Niles Lake Street and City Complex facilities of the National-Standard Company. Therefore, we affirm the district court's grant of summary judgment to EPA on this issue.[13] We also affirm the district court's judgment upholding the issuance of the warrant and denial of discovery to National-Standard.[14]

AFFIRMED

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[13] As outlined by the Supreme Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), summary judgment should be granted when there exists no genuine issue of material fact. Here, the appellant submits that conflicts between the affidavits of Ms. Witt and Mr. Richard Moessner, National-Standard's manager of environmental control, evidence such a genuine issue of material fact. Specifically, National-Standard argues that, although Ms. Witt attested to facts with sufficient particularity to support an administrative warrant, questions arise to the satisfaction of the level of particularity required by Rule 56(a) of the Federal Rules of Civil Procedure. Upon making a *de novo* examination of the subject matter of the summary judgment motion—the validity of the search and the warrant—however, we conclude that the appellant is mistaken. As demonstrated above, *supra* Part III.B., no genuine issues of material fact exist about the validity of the warrant.

[14] The district court ruled that National-Standard may not pursue discovery of the warrant application and obtain a hearing to challenge the factual assertions in Ms. Witt's affidavit. Mem. op. at 17. The court stated that *Franks v. Delaware*, 438 U.S. 154 (1978), allowed challenges of an affidavit's truthfulness only after a "substantial preliminary showing" of falsehood. *Id.*

In *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335 (7th Cir. 1979), we held that a district judge's decision to deny discovery of the facts attested to in support of an

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[14] *continued*

administrative warrant was, like all discovery decisions, "committed to the sound discretion of the district judge, and . . . may not be easily reversed on appeal." 589 F.2d at 1340. Where the information provided "was adequate on its face to establish probable cause[,] there was no need to pursue further discovery, and the judge acted properly in not granting such relief." *Id. Accord Donovan v. Mosher Steel Co.*, 791 F.2d 1535, 1537 (11th Cir. 1986) ("the reviewing court is charged with examining the magistrate's actual probable cause determination—not what he or she might have concluded based on information not presented in the warrant application"), *cert. denied*, 479 U.S. 1030 (1987); *cf. Brock v. Brooks Woolen Co., Inc.*, 782 F.2d 1066, 1069 (1st Cir. 1986) ("*Franks* merely holds that subfacial challenges are not *mandated* to protect a defendant's constitutional rights unless the specified showing is made.") (emphasis in original).

Under the *Gilbert & Bennett* rule, we find no abuse of discretion by the district court, and thus we affirm its denial of discovery to National-Standard.

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ute is made the basis of tort liability. This Court recognizes that section 1332(c) is inapplicable to the procedural posture of this case because this is not a "direct action" against the insurer within the meaning of the statute. *See Irvin v. Allstate Ins. Co.*, 496 F.Supp. 575, 577 (W.D.Okla.1977). However, those courts that have considered section 1332(c) in the context of uninsured motorist provisions of a plaintiff's insurance coverage have not only held that a plaintiff's claim based on its own uninsured motorist coverage is not a "direct action" against the insurer under section 1332(c), but have also thereafter specifically considered the residence of the uninsured motorist liability carrier for purposes of determining whether federal subject matter diversity jurisdiction exists. *See Fortson v. St. Paul Fire and Marine Ins. Co.*, 751 F.2d 1157, 1159–60 (11th Cir. 1985); *McGlinchey v. Hartford Accident & Indemnity Co.*, 666 F.Supp. 70 (E.D.Pa. 1987); *Carpenter v. Illinois Central Gulf R.R. Co.*, 524 F.Supp. 249, 252 (M.D.La. 1981); *Irvin v. Allstate Ins. Co.*, 496 F.Supp. 575, 577 (W.D.Okla.1977); *Bishop v. Allstate Ins. Co.*, 313 F.Supp. 875 (W.D. Ark.1970).

While it is true that "nominal or formal parties who have no interest in the action will be ignored" by the Court in determining the existence of complete diversity, in this case the relevant Tennessee statute gives Tennessee Farmers Mutual the legal right to represent itself and/or the defendant Garner in this tort suit. Therefore, its interest in this suit cannot be considered nominal for purposes of determining diversity. *See* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3606 nn. 2, 14 (1984).

Absent authority to the contrary, because the Tennessee courts consider the uninsured motorist carrier legally a party defendant when served pursuant to T.C.A. § 56-7-1206, this Court must consider the residency of Tennessee Farmers Mutual to determine if jurisdiction is proper in this Court. Because Tennessee Farmers Mutual is a Tennessee insurance company with its principal place of business in Tennessee, it is not diverse from the plaintiffs in this case. Having found that no diversity exists in this case, the motion to dismiss of Tennessee Farmers Mutual Insurance Company will be GRANTED. An appropriate order will enter.

NATIONAL-STANDARD COMPANY, Plaintiff,

v.

Valdas V. ADAMKUS, et al., Defendants.

Nos. 87 C 5165, 87 C 5392.

United States District Court, N.D. Illinois, E.D.

March 23, 1988.

Private company sought declaration that Environmental Protection Agency exceeded its authority in inspecting company's premises. The District Court, Plunkett, J., held that: (1) affidavit gave rise to probable cause for issuance of administrative search warrant, and (2) Agency was entitled to inspect premises upon showing of probable cause.

Ordered accordingly.

1. Searches and Seizures ⇐129

Probable cause for administrative search warrant may be based either on specific evidence of existing violation, or on showing that inspection is being conducted pursuant to general administrative plan for enforcement of statute derived from neutral sources.

2. Searches and Seizures ⇐129

Environmental Protection Agency official's affidavit was sufficient to support finding of probable cause for issuance of administrative search warrant where affidavit stated that hazardous wastes had

been generated, stored, treated, disposed of or transported from subject company's facilities, and that official's inspection of premises had revealed evidence of hazardous waste releases.

3. Searches and Seizures ⇐199

Company which was subject of administrative search warrant issued for benefit of Environmental Protection Agency could not pursue discovery or obtain hearing to challenge factual assertions in warrant application absent preliminary showing of false statements in affidavit.

4. Searches and Seizures ⇐129

Environmental Protection Agency did not act improperly in seeking administrative search warrant ex parte after it knew that company objected to its proposed sampling visit and had filed lawsuit to contest matter, absent showing that confidential information would be disclosed by virtue of Agency's sampling visit.

5. Health and Environment ⇐25.5(5.5)

Environmental Protection Agency may enter any place to inspect and take samples, upon showing of probable cause to believe that hazardous wastes are or have been stored in that place; moreover, Agency possesses limited authority to take samples from areas where hazardous wastes never were stored, in order to obtain background samples. Solid Waste Disposal Act, § 3007(a), as amended, 42 U.S.C.A. § 6927(a).

6. Health and Environment ⇐25.5(5.5)

Environmental Protection Agency's inspection and sampling authority is not limited to solid waste management units at storage facilities, but rather extends to any area in which hazardous wastes are or have been stored. Solid Waste Disposal Act, § 3007(a), as amended, 42 U.S.C.A. § 6927(a).

Luis M. Rundio, Jr., McDermott, Will & Emery, Chicago, Ill., Mary Ellen Hogan, Robert J. Slobig, McDermott, Will & Emery, for plaintiff.

Gail C. Ginsberg, Asst. U.S. Atty., for defendants.

MEMORANDUM OPINION AND ORDER

PLUNKETT, District Judge.

In this case, we are asked to determine the scope of the United States Environmental Protection Agency's ("EPA") inspection and sampling authority under the Resource Conservation and Recovery Act ("RCRA"), *as amended by* the Hazardous and Solid Waste Amendments of 1984 ("HSWA"), 42 U.S.C. § 6901, *et seq.*[1] Plaintiff National-Standard Company ("National-Standard") filed this action for declaratory and injunctive relief challenging the propriety of EPA's entrance onto its properties for an inspection and sampling visit. We conclude that EPA acted within the scope of its statutory authority at all times, and therefore we enter summary judgment for EPA.

I. Statutory Framework

RCRA is a comprehensive statutory scheme designed to regulate the storage, transportation, and disposal of solid wastes in the United States. RCRA provides that every person owning or operating a facility for the treatment, storage, or disposal of hazardous wastes or hazardous constituents,[2] or planning to construct such a facili-

1. All of the statutory references in this opinion, except as otherwise explicitly noted, are to Title 42 of the United States Code.

2. The term 'hazardous waste' means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical, or infectious characteristics may—

(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or

(B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.

42 U.S.C. § 6903(5).

'Hazardous Waste Constituent' means a constituent that caused the Administrator to list the hazardous waste in Part 261, Subpart D, of this chapter [40 C.F.R. § 261.30, *et seq.*] or a constituent listed in Table 1 of § 261.24 of this chapter [40 C.F.R. § 261.24].

ty, must obtain a permit from EPA. § 6925(a). Section 6925(c)(1) provides that a permit will issue if the hazardous waste treatment, storage, or disposal facility complies with all of the standards and requirements set forth in sections 6924 and 6925. Among the many requirements in those sections is the requirement that any release of hazardous wastes from any facility, regardless of whether the spill occurred before or after the issuance of the permit, must be cleaned up:

> (u) Continuing Releases at Permitted Facilities.—Standards promulgated under this section shall require, and a permit issued after November 8, 1984, by the Administrator or a State shall require, corrective action for all releases of hazardous waste or constituents from any solid waste management unit at a treatment, storage, or disposal facility seeking a permit under this subchapter, regardless of the time at which waste was placed in such unit. Permits issued under section 6925 of this title shall contain schedules of compliance for such corrective action (where such corrective action cannot be completed prior to issuance of the permit) and assurances of financial responsibility for completing such corrective action.

42 U.S.C. § 6924(u).[3]

RCRA also provides that EPA may require a person owning or operating a facility on "interim status" [4] to take corrective action in the event hazardous wastes are released into the environment:

> (h) Interim status corrective action
>
> (1) Whenever on the basis of any information the Administrator determines that there is or has been a release of hazardous waste into the environment from a facility authorized to operate under section 6925(e) of this title, the Administrator may issue an order requiring corrective action or such other response measure as he deems necessary to protect human health or the environment or the Administrator may commence a civil action in the United States district court in the district in which the facility is located for appropriate relief, including a temporary or permanent injunction.
>
> (2) Any order issued under this subsection may include a suspension or revocation of authorization to operate under section 6925(e) of this title, shall state with reasonable specificity the nature of

40 C.F.R. § 260.10. In addition, Appendix VIII to Part 261 of 40 C.F.R. lists hundreds of chemical elements, compounds, and organic molecules which are hazardous constituents, as does Table 302.4 of 40 C.F.R. (list of hazardous substances for purposes of CERCLA).

3. Neither RCRA nor the regulations promulgated thereunder explicitly define what the term solid waste management unit ("SWMU") means. The regulations *do* define a "*hazardous* waste management unit" as follows:

> 'Hazardous waste management' unit is a contiguous area of land on or in which hazardous waste is placed, or the largest area in which there is significant likelihood of mixing hazardous waste constituents in the same area. Examples of hazardous waste management units include a surface impoundment, a waste pile, a land treatment area, a landfill cell, an incinerator, a tank and its associated piping and underlying containment system and a container storage area. A container alone does not constitute a unit; the unit includes containers and the land or pad upon which they are placed.

40 C.F.R. § 260.10. From this definition, we can infer that a SWMU is a "contiguous area of land on or in which *solid waste* is placed...." This definition of an SWMU is borne out by language accompanying EPA's promulgation of final regulations under HSWA.

> The term 'solid waste management unit' includes any unit at the facility from which hazardous constituents might migrate, irrespective of whether the units were intended for the management of solid and/or hazardous wastes.' H.R.Rep. No. 198, 98th Cong., 1st Sess., Part 1, 60 (1983) ... EPA believes that the term 'unit' at least encompasses ... 'containers, tanks, surface impoundments, waste piles, land treatment units, landfills, incinerators, and underground injection wells.' 47 FR 32281 (July 26, 1982).

50 Fed.Reg. 28712 (July 15, 1985).

4. Any person who has applied for a permit on an existing facility, which facility is required to have a permit, and who has complied with section 6930(a) (requiring notification to the EPA of the location and description of hazardous wastes), shall be granted "interim status." § 6925(e)(1). A person on interim status may generate, store, and dispose of hazardous wastes as if he or she had a permit, *id.*, with some exceptions, (such as § 6925(l) and (j), irrelevant to this case.

the required corrective action or other response measure, and shall specify a time for compliance. If any person named in an order fails to comply with the order, the Administrator may assess, and such person shall be liable to the United States for, a civil penalty in an amount not to exceed $25,000 for each day or noncompliance with the order.

42 U.S.C. § 6928(h).

The case before this court challenges the scope of EPA's inspection and sampling powers under RCRA. EPA's general authority to enter, inspect, and obtain samples from RCRA regulated facilities comes from section 6927(a):

(a) Access entry

For purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter, any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes shall, upon request of any officer, employee or representative of the Environmental Protection Agency, duly designated by the Administrator, or upon request of any duly designated officer, employee or representative of a State having an authorized hazardous waste program, furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes. For the purposes of developing or assisting in the development of any regulation or enforcing the provisions of this chapter, such officers, employees or representatives are authorized—

(1) to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from;

(2) to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes.

Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the sample obtained and if requested a portion of each such sample equal in volume or weight to the portion retained. If any analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator, or agent in charge.

The issue in this case is whether the EPA, acting pursuant to section 6927(a), lawfully entered National-Standard's facilities, inspected the premises, and took samples.

II. Facts

National-Standard manufactures wire products at its two facilities in Niles, Michigan, known as the Lake Street facility and the City Complex facility. In the course of its manufacturing activities, National-Standard generates materials (such as hydrochloric acid, sulfuric acid, and alkaline wastes) which are within the RCRA definition of "hazardous wastes." § 6903(5). As required by law, National-Standard applied to EPA for a Part B permit under RCRA (*see* 40 C.F.R. Part 270) for the temporary storage of the hazardous wastes it generated. At present, the application remains pending and National-Standard is operating its waste storage facilities on "interim status." *See* n. 4, *supra*.

On April 3, 1987, EPA informed National-Standard that it was planning a sampling visit at National-Standard's facilities as the next stage of the corrective action program required under section 6924(u). EPA wanted to see if any corrective action was required at National-Standard's facilities before granting the company a permit to store hazardous wastes. EPA wanted its subcontractors (defendants Harding-Lawson Associates and K.W. Brown) and representatives of the Michigan Department of Natural Resources ("MDNR") to accompany it on the sampling visit and to actually take the samples and analyze them. EPA identified twenty areas it wanted to sample at the Lake Street facili-

ty and ten such areas at the City Complex site.

National-Standard objected to EPA's proposed sampling visit as beyond the scope of EPA's statutory sampling authority. After unsuccessful attempts to resolve their differences, National-Standard filed the present action for declaratory relief. National-Standard sought a declaration that the EPA's proposed sampling visit exceeded its statutory authority.

Three days later, and despite its knowledge of the pendency of this case, EPA applied *ex parte* to a magistrate in the United States District Court for the Western District of Michigan (the district in which National-Standard's facilities are located) for an administrative search warrant. EPA submitted the affidavit of Carol Witt, a geologist employed by EPA, in support of its warrant application. Witt's affidavit stated that she had visually inspected National-Standard's facilities and had determined that there were several SWMUs (see n. 3, *supra*) at each facility. Witt further stated that she determined from her observations of discolored soil, surface water body sediments, discontinuities in vegetation, and odors, that there had been releases of what may be hazardous wastes or constituents from some of the SWMUs. Witt stated she believed the releases may have been of hazardous wastes because they were near SWMUs containing ignitable solid wastes, copper cyanide, lead, or wastewater treatment sludges from electroplating operations. Witt proposed taking no more than sixty soil, water, and air samples, including background samples, at the facilities.

The magistrate issued the warrant as requested. The warrant authorized the EPA to enter National-Standard's plants, to inspect the premises, and to take up to sixty samples.

National-Standard immediately came into this court seeking an emergency order quashing the search warrant and temporarily restraining EPA from conducting its sampling visit. We declined to issue the temporary restraining order, finding no irreparable injury and finding the equities favored the EPA. Subsequently, however, the parties reached an agreement to maintain the status quo pending judicial resolution of their dispute. EPA's contractors were given access to National-Standard's facilities, but the results of the analysis of those samples have been withheld from EPA pending resolution of this suit.

III. The Parties' Arguments

EPA contends that National-Standard's suit is essentially an attack on the validity of the administrative search warrant issued by the magistrate in Michigan. EPA maintains that the warrant which authorized EPA to search, inspect, and sample National-Standard's facilities was completely proper. In arguing the validity of the warrant, EPA first contends that our review of the magistrate's determination to issue the warrant is limited to the materials presented to the magistrate. According to EPA, we are not supposed to conduct an evidentiary hearing or consider extrinsic evidence unless National-Standard alleges that the warrant application contained deliberate falsehoods or recklessly disregarded the truth and unless National-Standard supports its allegations with an offer of proof. Moreover, EPA argues we should not even allow discovery when the application for the administrative warrant was based on the sworn affidavit of a government officer and that affidavit was adequate on its face to establish probable cause. EPA concludes that its warrant application, supported by the sworn affidavit of one of its environmental scientists, conclusively established probable cause for an administrative warrant. Lastly with respect to the warrant, EPA denies that the warrant was improperly issued in an *ex parte* proceeding.

Concerning the merits of National-Standard's challenge, EPA argues that section 6927(a) grants it the right to enter National-Standard's facilities, and to inspect and take samples just as authorized by the search warrant. EPA reads the statute as granting it access to any place where hazardous wastes are now or have been located in the past. EPA rejects a narrow read-

ing of section 6927(a) which would limit it to inspect and sample only SWMUs from which there has been a release of hazardous wastes. Although under section 6927(a) EPA can enter and inspect a facility only "for the purposes of ... enforcing the provisions of" RCRA, EPA contends that it was seeking to enforce sections 6924(a) and 6928(h). Finally, EPA contends that the statute implicitly grants it the authority to sample, as well as inspect, areas which *may* contain hazardous wastes and also to take background samples.

National-Standard focuses its arguments on what it claims was the improper method by which EPA obtained the search warrant and on EPA's lack of statutory authority to enter, inspect, and obtain samples from National-Standard's facilities in the manner it did. National-Standard first attacks EPA's interpretation of RCRA. National-Standard contends that section 6927(a) grants EPA authority only to enter places where hazardous wastes *are or have been stored*, not any place where hazardous wastes might possibly be or might have been stored. According to National-Standard, section 6927(a) does not authorize EPA to take background samples from areas where hazardous wastes have never been stored. National-Standard also points out that EPA is statutorily empowered to order corrective action under sections 6924(u) and 6928(h) only when there has been (a) a release (b) of hazardous wastes or constituents (c) from a SWMU. Since EPA's inspection power under section 6927(a) is limited to the purposes of enforcing the provisions of RCRA, and the only provisions EPA has invoked are the corrective action requirements in sections 6924(u) and 6928(h), National-Standard concludes that EPA may inspect and sample only SWMUs from which there have been a release of hazardous waste or constituents.

National-Standard also argues that the administrative warrant issued by the magistrate is invalid because it was obtained in a procedurally improper manner. National-Standard argues that EPA improperly obtained the warrant on an *ex parte* basis. National-Standard contends that once it filed this declaratory judgment action, EPA should have argued its position before this court and awaited judicial resolution rather than appear before another court and obtain a warrant. And National-Standard argues that EPA's warrant application failed to demonstrate probable cause for the search. National-Standard contends there was no "specific evidence" justifying the inspection and sampling visit because Witt failed to explain how she determined certain areas were SWMUs or that releases of what may be hazardous wastes had occurred. National-Standard concludes the warrant application was deficient on its face. In addition, National-Standard demands discovery and a hearing on the validity of the warrant.

IV. Discussion

The ultimate question in this case is whether EPA is entitled to see and use the results of its sampling visit at National-Standard's facilities. The "search and seizure" has already occurred; the issue is whether we should "suppress" the evidence gathered as a result. Although this is a civil case, analogy to criminal law seems apt. In a criminal case, a law enforcement agency searches someone or some place and seizes evidence. On a motion to suppress, the question is whether the search and seizure was lawful. The goal, from the criminal defendant's point of view, is to prevent the jury from learning of the evidence obtained as a result of the search and seizure. Similarly, in the present context, National-Standard is seeking to prevent EPA from obtaining the evidence resulting from the allegedly unlawful entry onto and inspection and sampling of its property.

National-Standard does not challenge the constitutionality of section 6927. It apparently concedes that if EPA adhered to the statute and followed the proper procedures in obtaining an administrative search warrant, the ensuing search would be lawful. First we consider whether the warrant was issued in an improper manner. Then we consider whether EPA exceeded its statutory authority. For the following reasons, we conclude that the warrant was

issued in a proper manner and that EPA did not exceed its statutory authority.

A. The Warrant

[1] In general, the government may not enter onto private commercial property unless authorized by a valid search warrant. *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). *See also Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967).[5] While every search warrant must be supported by probable cause, an administrative search need not be supported by probable cause in the criminal sense. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320, 98 S.Ct. 1816, 1824, 56 L.Ed.2d 305 (1978). Probable cause in an administrative context may be based either on specific evidence of an existing violation, *id.*, or on a showing that the inspection is being conducted pursuant to a general administrative plan for the enforcement of a statute derived from neutral sources. *Id.* at 321, 98 S.Ct. at 1824–25.

Here, EPA sought to establish probable cause for the inspection of National-Standard's facilities under the "specific evidence" prong of administrative probable cause. There is no precise definition for "probable cause"; by necessity, a probable cause determination depends on the particular facts of each case. *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). One thing we know, however, is that the requirements of administrative probable cause are less stringent than those governing criminal probable cause. *Weyerhaeuser Co. v. Marshall*, 592 F.2d 373, 377 (7th Cir.1979); *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1339 (7th Cir.), *cert. denied*, 444 U.S. 884, 100 S.Ct. 174, 62 L.Ed.2d 113 (1979). Case law helps us determine what quantum of facts are enough to establish probable cause and what quantum clearly fall short.[6]

In *Weyerhaeuser*, OSHA sought entrance to Weyerhaeuser's plant to conduct an administrative inspection. In its warrant application, OSHA stated it had received a written complaint from an employee of Weyerhaeuser alleging that violations of the OSHA Act existed which threatened physical harm or injury to employees at the plant. OSHA said that based on the information in the complaint, it had determined there were reasonable grounds to believe that such violations existed. The Seventh Circuit found the warrant application inadequate to support a determination of probable cause. 592 F.2d at 378. The magistrate was given no clue as to what the nature of the alleged violations might be. The court described the warrant application as "unrelieved boiler plate" which turned the magistrate into a "rubber stamp." *Id. See also In re Establishment Inspection of Northwest Airlines, Inc.*, 587 F.2d 12 (7th Cir.1978).

In *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir.1980), OSHA again sought entrance to a company's plant for purposes of investigating employee complaints. This time, however, the Seventh Circuit found the warrant application sufficient to support a finding of probable cause. The warrant application informed the magistrate of the

5. While conceding for purposes of this case that it needed a warrant to enter National-Standard's property, EPA notes that the Supreme Court has found an exception to the warrant requirement for inspections of closely regulated businesses. *See New York v. Burger*, — U.S. —, 107 S.Ct. 2636, 96 L.Ed.2d 601 (1987) (automobile junkyard industry); *Donovan v. Dewey*, 452 U.S. 594, 101 S.Ct. 2534, 69 L.Ed.2d 262 (1982) (coal mining); *United States v. Biswell*, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972) (firearms sales); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970) (liquor industry). Since EPA obtained a warrant in this case and we find that warrant valid, we have no occasion to address the propriety of a warrantless entry.

6. In evaluating whether probable cause existed to support the issuance of a warrant, EPA correctly points out that we may consider only the evidence before the magistrate at the time of application for the inspection warrant. *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335, 1342 (7th Cir.), *cert. denied*, 444 U.S. 884, 100 S.Ct. 174, 62 L.Ed.2d 113 (1979). Moreover, we give great deference to the magistrate's determination of probable cause for an administrative warrant. *United States v. May*, 819 F.2d 531 (5th Cir.1987).

nature of the employee complaints—broken plumbing, poor ventilation, unsanitary eating areas, and inadequate fire escapes (*id.* at 1315 n. 1)—and stated that OSHA had determined that reasonable grounds existed to believe that violations were occurring. 625 F.2d at 1319. The court stated that despite the unsupported and unverified statements of unknown informants, the warrant application was adequate. "In the context of an administrative probable cause determination, however, the oath of the compliance officer is entitled to greater weight than plaintiff seems willing to accord it.... The district judge could correctly assume, therefore, that the information contained [in the sworn affidavit of the OSHA compliance officer] was true and correct.'" *Burkart*, 625 F.2d at 1319–20, *quoting Gilbert & Bennett*, 589 F.2d at 1340.

In essence, an affidavit is adequate to support a probable cause determination when "it provide[s] the magistrate with the underlying factual data giving rise to the compliance officer's belief that a violation existed." *In re Establishment Inspection of Marsan Co.*, 7 OSHC (BNA) 1557, 1559 (N.D.Ind.1979), *quoted in Burkart*, 625 F.2d at 1320. In the end, of course, the ultimate test is reasonableness: is the inspection reasonable and is it justified? *Burkart*, 625 F.2d at 1319.

[2] We now apply these principles to the case before us. An examination of the warrant application reveals it was clearly sufficient to support a finding of probable cause. Accompanying the warrant application was the affidavit of Carol Witt, an EPA geologist with a master's degree in Earth Science. Witt stated, under oath, that National-Standard's facilities are places where hazardous wastes are or had been generated, stored, treated, disposed of or transported from. She further stated that on previous occasions she had personally inspected the facilities for purposes of enforcing the corrective action provisions of RCRA. During these previous inspections, she had determined there were several SWMUs at the facilities, and had determined "that there have been releases of what may be hazardous wastes or constituents from some of the SWMUs." (Witt Affid., ¶ 13.) Witt stated that she knew releases had occurred because there was discolored soil, surface water body sediments, discontinuities in vegetation, and odors. She stated that the releases might be hazardous wastes or constituents because the releases were near SWMUs containing hazardous wastewater treatment sludges, lead, copper-cyanide, and other ignitable substances.

This information clearly was sufficient to inform the magistrate of the substance of the possible violations, so that the magistrate could exercise his independent judgment as to whether a formal inspection and sampling visit was justified. In no way was the warrant application mere boilerplate, nor did the magistrate become merely a rubber stamp. There are sworn statements of an EPA officer (which we may assume are true and accurate) stating that she believed, from personal knowledge, that releases of hazardous wastes had occurred. She even stated the basis for her belief. The warrant application was much more extensive and informative than the one which passed muster in *Burkart*, and we conclude the warrant application on its face was sufficient to support a finding of probable cause.

[3] The next issue is whether National-Standard may pursue discovery and obtain a hearing to challenge the factual assertions in the warrant application. We conclude it may not. In *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), the Supreme Court held that a criminal defendant may challenge the truthfulness of factual statements made in an affidavit supporting a search warrant, but only after the defendant had made allegations of deliberate falsehood or of reckless disregard for the truth, and after supporting those allegations with an offer of proof. *Id.* at 171, 98 S.Ct. at 2684. As we stated above, an affidavit supporting a warrant is presumptively correct; to be entitled to a *Franks* hearing, a person attacking the validity of a warrant must make a "substantial preliminary showing." *United*

States v. McDonald, 723 F.2d 1288, 1292 (7th Cir.1983), *cert. denied*, 466 U.S. 977, 104 S.Ct. 2360, 80 L.Ed.2d 831 (1984), *quoting Franks*, 438 U.S. at 155, 98 S.Ct. at 2676.

National-Standard has not even attempted to make the requisite showing. It has neither identified any false statements made by Witt nor presented any evidence proving their falsity. National-Standard has not yet shown any entitlement to a *Franks* hearing.

National-Standard contends, however, that it retains the right to engage in discovery. It argues that Rule 57 of the Federal Rules of Civil Procedure preserves the right to discovery in an action for declaratory judgment. EPA does not dispute that a party in a declaratory judgment action retains the same rights to discovery as in a "normal" civil action. EPA contends, however, that no party challenging the veracity of an affidavit supporting an administrative search warrant is entitled to discovery; hence, EPA concludes, no such party pursuing a declaratory judgment action is entitled to discovery either. While we offer no opinion on whether *no* party challenging the veracity of an affidavit supporting an administrative search warrant is entitled to discovery, we agree with EPA that National-Standard in this case is not entitled to discovery.

In *Gilbert & Bennett*, the company argued on appeal that the district judge had abused his discretion and denied the company due process of law by not granting it discovery prior to denying its motion to quash the administrative warrant. The court of appeals rejected this argument:

> Discovery decisions are committed to the sound discretion of the district judge, and they may not be easily reversed on appeal. In the instant case the warrant application, which referred to an "employee complaint," incorporated the sworn affidavit of an OSHA compliance officer. The district judge could correctly assume, therefore, that the information contained therein was true and correct. Because this information was adequate on its face to establish probable cause there was no need to pursue further discovery, and the judge acted properly in not granting such relief.

589 F.2d at 1340.

In the present case, to prevail on the merits, National-Standard must demonstrate deliberate falsity in Witt's affidavit. We think it extremely unlikely National-Standard could succeed. The affidavit indicated why Witt believed releases had occurred and why she believed the releases were of hazardous wastes. Accompanying the affidavit were photographs of what appear to be chemical spills, polluted water, leaking barrels, dead vegetation, and so on. As long as these photographs were taken at National-Standard's facilities, EPA had probable cause to conduct a closer inspection and sampling visit. The likelihood that National-Standard could obtain evidence to the contrary is extremely remote. The cost of discovery far outweighs any potential benefits arising from discovery. Therefore, we will grant the EPA's motion barring further discovery.

[4] Having now decided that the warrant was supported by probable cause, and that National-Standard is entitled to neither discovery nor a *Franks* hearing, we now must determine whether EPA violated National-Standard's rights when it sought the warrant on an *ex parte* basis and whether the magistrate erred by issuing the warrant on such a basis. There is no doubt that the Fourth Amendment does not prohibit the issuance of administrative warrants on an *ex parte* basis. *Stoddard Lumber Co., Inc. v. Marshall*, 627 F.2d 984, 989 (9th Cir.1980). Indeed most warrants, whether criminal or administrative, are issued on an *ex parte* basis. National-Standard's objection is not to EPA's general practice of obtaining administrative warrants *ex parte;* National-Standard objects to EPA's application for a warrant *ex parte* after it knew National-Standard objected to EPA's proposed sampling visit and even after National-Standard filed this lawsuit to contest the matter.

National-Standard relies exclusively on *In re Stauffer Chemical Co.*, 14 E.R.C. 1787 (D.Wyo.1980), *aff'd sub nom. Stauf-*

for Chemical Co. v. E.P.A., 647 F.2d 1075 (10th Cir.1981). In *In re Stauffer*, EPA sought access to Stauffer's plant for purposes of conducting an inspection pursuant to the Clean Air Act. EPA wanted to bring into the plant two employees of a private consulting firm who would do the actual inspection. Stauffer, voicing concerns about giving private parties access to plant areas containing confidential processes and trade secret information, insisted that the consultant's employees sign nondisclosure and hold-harmless agreements. Stauffer further reserved the right to exclude the consultant's employees from certain areas of the plant not containing emission sources. Despite ongoing negotiations between Stauffer and EPA, EPA sought and obtained in an *ex parte* proceeding an administrative warrant granting EPA and its consultants full access to Stauffer's plant.

The district court granted Stauffer's motion to quash the administrative warrant. The court found that the employees of the consultant were not "authorized representatives" of the EPA as that term is used in the Clean Air Act. The court further found that EPA's use of an *ex parte* proceeding to obtain an administrative warrant was "improper and violated principles of fundamental fairness." 14 E.R.C. at 1741. The district judge felt that denying Stauffer the opportunity to contest the issue *before* the warrant was issued violated fundamental principles of justice and fair play. *Id.*

We find *In re Stauffer* distinguishable from the case at bar and hence inapplicable. The real evil perpetrated by EPA in *In re Stauffer* was that Stauffer would be irreparably harmed once the consultant's employees entered sensitive areas of the plant. Despite this imminent and real harm to Stauffer, and despite EPA's knowledge of Stauffer's concerns, EPA proceeded *ex parte* to get a warrant. By contrast, National-Standard never tendered "trade secrets" or "confidential information" as a reason for disputing EPA's right to conduct an inspection and sampling visit. National-Standard simply disagreed with EPA's interpretation of RCRA. National-Standard would not suffer the same kind of immediate harm as that suffered by Stauffer—no confidential information would be disclosed by virtue of EPA's sampling visit. In any event, EPA informed the magistrate of National-Standard's objections to the inspection, and if the magistrate wanted to hear National-Standard's arguments, he easily could have so requested. *In re Stauffer* condemns EPA for what that court perceived to be egregious behavior. We do not view EPA's behavior in this case as so egregious as to call for condemnation and sanctions. We think it may have been better for EPA to inform National-Standard of its intent to seek a warrant and give the company a chance to appear and object. Nevertheless, EPA's failure to do so does not constitute grounds to quash the warrant.

B. EPA's Statutory Authority

[5] In order to carry out the broad remedial goals of RCRA, EPA enjoys wide authority to regulate the storage, transportation, and disposal of hazardous and other solid wastes. The statute explicitly gives EPA the power to inspect areas where hazardous wastes are stored and to take samples of such wastes. § 6927(a). National-Standard would interpret this section to require EPA to know that hazardous wastes are or had been stored at a particular location within a facility before it could enter that location and take samples. We reject any such interpretation which would emasculate EPA's ability to pursue the broad remedial goals of RCRA. Contrary to its argument, National-Standard's interpretation is not compelled by the plain language of the statute. The main purpose of an inspection and sampling visit is to detect the presence of hazardous wastes. If EPA could not inspect an area unless it knew hazardous wastes were stored there, EPA would be rendered effectively powerless.

Other law enforcement personnel are not burdened with the requirement National-Standard would have us impose on EPA. In the criminal law, when police obtain a warrant to enter a person's house and seize a particular weapon, the police need not be

certain that the weapon is in that house. All they need is probable cause. Even if the person who answers the door tells the police that no such weapon is to be found within, the police may enter and look for themselves. By the same token, EPA need not know that hazardous wastes were stored in a particular location to inspect that area and take samples. All EPA needs is probable cause. Moreover, EPA need not believe National-Standard when it says that hazardous wastes had never been stored at a particular location. EPA is entitled to go to see for itself. As long as EPA has probable cause to believe that hazardous wastes are or have been stored in any place, EPA may enter that place to inspect and take samples.

But EPA's sampling authority is not limited to areas where there is probable cause to believe hazardous wastes are or have been stored. EPA possesses a limited authority to take samples from areas where hazardous wastes never were stored. The power to take background samples is implicit in EPA's power to detect releases of hazardous wastes. Any valid scientific survey or experiment requires the existence of a control group, one that remained untouched by whatever the experiment was designed to test. In the pharmaceutical world, this means giving part of the study group a placebo and part of the group the drug under investigation. In the environmental world, when the quest is to determine whether man has introduced various substances into the environment, scientists need to take samples of pristine locations as a control. There is no indication in the statute that Congress intended to foreclose EPA from taking control or background samples in the ordinary course of scientific investigation.[7]

[6] Finally, National-Standard argues that EPA has statutory authority to inspect and sample only areas that are SWMUs. National-Standard bases its argument on section 6924(u), the corrective action section. National-Standard then expends much energy in arguing that most of the locations from which EPA took samples are not SWMUs. We reject National-Standard's attack because of its faulty premise, that only SWMUs may be inspected and sampled.

Section 6924(u) limits EPA's authority to order corrective action to releases from SWMUs at storage facilities. If EPA were trying to order corrective action at locations which are not SWMUs, National-Standard's argument would have some force. But RCRA does not limit EPA's inspection and sampling authority to SWMUs. EPA may inspect *any* area in which hazardous wastes are or have been stored; similarly, EPA may take samples of hazardous wastes from any person. § 6927(a). There simply is no mention of SWMUs in section 6927(a) or any indication that Congress implicitly intended to limit EPA's inspection and sampling authority under RCRA to SWMUs.[8] Therefore, we reject any reading of section 6927(a) which limits EPA's inspection and sampling authority to SWMUs. We conclude that EPA acted within its statutory authority at all times.[9]

7. National-Standard contends that EPA chose as its background sampling locations areas in which pesticides and fertilizers had been applied, and an area which used to be a livestock barn. Even if true, EPA's unwise selection of background sampling points in this case does not affect its right to take background samples in general. National-Standard may contest the validity of the sampling visit in the normal course of the RCRA permitting process.

8. National-Standard argues that EPA's authority under section 6927(a) is restricted to inspections and sampling visits "[f]or the purpose of ... enforcing the provisions of this chapter." This is true, but EPA's authority in any given case is not limited to one or two sections explicitly invoked. EPA's mandate under Chapter 82 of Title 42, §§ 6901-6991, is quite broad. EPA is empowered to carry out the national policy of treating, storing, and disposing of wastes "so as to minimize the present and future threat to human health and the environment." § 6902(b). The provisions of RCRA are broad enough to authorize EPA to inspect and sample areas which are not SWMUs.

9. Because we find EPA's conduct entirely lawful, we also find the actions of its employees and consultants lawful. Neither K.W. Brown nor Harding-Lawson Associates exceeded the authority granted them by RCRA.

V. Conclusion

The defendants obtained a valid warrant authorizing them to inspect and sample National-Standard's facilities. They did not exceed their statutory authority. We find no genuine issues of material fact and determine entry of summary judgment for defendants to be appropriate. We hereby hold the defendant's conduct lawful, and enter declaratory judgment accordingly.

UNITED STATES of America ex rel. John DURHAM, Petitioner,

v.

Michael O'LEARY, Warden, Respondent.

No. 87 C 10762.

United States District Court, N.D. Illinois, E.D.

March 28, 1988.

Attempted murder defendant, sentenced to nonparolable life imprisonment, brought habeas proceeding alleging insufficiency of the evidence and violation of Eighth Amendment. The District Court, Aspen, J., held that: (1) testimony of attempted murder victim was sufficient to uphold defendant's conviction; (2) automatic sentencing provisions of Illinois Habitual Offenders Act did not violate Eighth Amendment; (3) capital punishment precedents were not applicable in noncapital situations; and (4) state demonstrated defendant's prior convictions beyond reasonable doubt.

Writ denied.

1. Homicide ⇐224(6)

Testimony of attempted murder victim, relating identity of perpetrator, was sufficient to uphold defendant's conviction, despite darkness in room where attack occurred, inconsistencies in victim's testimony, and victim's blurred vision.

2. Habeas Corpus ⇐45.2(1)

During federal habeas proceedings, district court lacked authority to overturn state conviction on ground that conviction violated state law.

3. Criminal Law ⇐1213.2(1)

Automatic sentencing provisions in Illinois Habitual Offenders Act, requiring automatic nonparole life sentence upon third conviction for certain violent crimes within 20-year period, did not violate Eighth Amendment prohibitions against cruel and unusual punishment; consideration of potential mitigating factors was not required. Ill.S.H.A. ch. 38, ¶ 33B-1 *et seq.*; U.S.C.A. Const.Amend. 8.

4. Constitutional Law ⇐278(4)
Criminal Law ⇐1208.17

Attempted murder defendant was not denied due process during his sentencing hearing under Illinois Habitual Offenders Act, which resulted in defendant's nonparole life imprisonment, where state demonstrated defendant's previous Class X felony convictions beyond reasonable doubt, even though Act did not require such a showing; certified copies of defendant's prior convictions and defendant's admissions that he had been convicted of those offenses were sufficient. Ill.S.H.A. ch. 38, ¶ 33B-1 *et seq.*; U.S.C.A. Const.Amend. 14.

John Durham, pro se.

Michael J. Singer, Terence Madsen, Asst. Attys. Gen., Chicago, Ill., for respondent.

MEMORANDUM OPINION AND ORDER

ASPEN, District Judge:

Petitioner John Durham seeks habeas relief pursuant to 28 U.S.C. § 2254 from his attempted murder conviction and sentence of natural life imprisonment without parole. For the reasons stated herein, the petition is denied.

EPA ENTRY AND POST-ENTRY RIGHTS WITH AND WITHOUT WARRANTS

BY JOHN A. HAMILL*

INTRODUCTION

This paper was written in an attempt to bring some coherence and analytical structure to the "crisis" issue faced by both EPA and private counsel when the telephone rings and a stressed voice inquires: "EPA is here. They say they want to inpsect. Can they do it? Do I have to let them in?" Underlying those practical questions is a host of others that might be asked: "What rights do EPA personnel have to enter private property? Where do those rights come from? For what purposes can they be exercised? How can one know whether EPA truly has such rights? Does EPA have to have a warrant? What happens if EPA is interfered with?"

The topic of governmental entry onto private premises in connection with federal or state environmental law enforcement is not dealt with holistically in the typical text. Yet that turns out to be the point of initial confrontation for the adversaries in most major environmental cases. This paper strives to lead the reader through the main issues in controversy on the subject, leaving sub-issues to be probed at more esoteric leisure. The analytical starting points for the matters most likely to be issues of contention between parties are suggested. Admittedly, the paper espouses a viewpoint that supports governments' prerogatives against polluters.

BACKGROUND

A. *Historical Note*

The Fourth Amendment to the United States Constitution states that:

> [T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Thoughout two centuries, courts have expanded on our understanding of the boundaries of this basic right. Currently, under federal law, some searches, seizures, entries, and inspections are constitutionally reasonable (with or without a judicially issued warrant) and others are constitutionally "unreasonable" even if expressly authorized by statute unless (1) performed pursuant to a judicially issued warrant or a "functional equivalent" of such a warrant, or (2) performed with the possessors' consent, or (3) exempted by caselaw, as in the case of pervasively regulated industries or where public safety considerations prevail, from the warrant requirement. Therefore, absent one of the other two exceptions, *1/* in most instances federal agents must hold a judicially issued warrant, or a functional equivalent to a warrant, for entry to be "reasonable."

B. *Generic Nature of Warrants*

Generically, a "warrant" is merely "[a] writ or precept from a competent authority in pursuance of law, directing the doing of an act, and addressed to an officer or person competent to do the act, and affording him protection from damage, if he does it." *2/*

A judicial warrant is, first, an authentication and, secondly, an authorization. Analytically, a warrant confirms, corroborates, and verifies that (1) a substantive governmental right and power lawfully exists to enter premises and there to perform specified post-entry activities; (2) the holders of the warrant are properly authorized by law to exercise such substantive power; and (3) the provisions and terms of the warrant itself sufficiently circumscribe for constitutional purposes the physical boundaries to be observed and restrict the activities that may be done there. Most importantly, where a statute confers a substantive entry right without specifying a particular method for its enforcement, *3/* an administrative warrant may issue *4/* to verify and confirm such rights.

Civil administrative warrants are inherently similar to warrants issued under Rule 41 of the Federal Rules of Criminal Procedure. Issues such as staleness, descriptions of premises and seizable items, and specification of post-entry activities are, and should be, addressed by the courts in the same manner in both instances. Criminal warrant decisions are, therefore, usable precedents for issues raised in administrative warrant cases except where considerations unique to the criminal law are involved.

Warrants can encompass a variety of activities. They are not limited to praecipes only for searches or only for seizures. Narrow assumptions concerning what a warrant may or may not prescribe hamper proper legal analysis. Such a constricted view is not supported by legal authority or by analytical reasoning.

Administrative warrants are not inherently different from other types of warrants, despite assertions to the contrary. *5/* Traditionally, all warrants carry with them the power to do whatever is reasonably necessary to carry out their commands. *6/* The significant difference between warrants and other administrative investigative tools is that warrants do not obligate the possessor of the premises to take any affirmative action. Other tools, such as subpoenas, require an affirmative act or trigger a statutory duty. The administrative warrant validates, confirms, "credentializes," and authorizes.

C. *Provenance of Warrant Issuing Authority*

Disputes over the precise source of the power to issue warrants are somewhat idle. The most satisfactory view is that the source is Article III of the United States Constitution, granting the federal judiciary general equity power. *7/*

Prior to the decision in *Marshall v. Barlow's, Inc., 8/* the appellate courts were stumbling around in attempting to give effect to an agency's statutorily granted right to enter premises. Some courts flatly said that "entry" rights were to be effected through a warrant procedure. *9/* Others, with some hesitancy, agreed but only through a process of elimination. *10/*

D. *The Barlow's Decision 11/*

Finally, in 1978 the U.S. Supreme Court decided *Marshall v. Barlow's, Inc.*, involving the constitutionality of the Occupational Safety and Health Act under which the Occupational Safety and Health Administration (OSHA) operates. In that decision, the Court condemned the statute insofar as it could be interpreted as allowing OSHA inspectors, through self-help, to enter an establishment's private areas without a warrant, over the occupant's objection, and there to exercise statutory rights. The Court confirmed the lawfulness of OSHA's statutorily created rights to enter premises but did so only by interposing, through the Fourth Amendment, a warrant requirement. The Court ruled OSHA must first obtain a judicial warrant or its functional equivalent.

The Court took care to point out that "cause" in the administrative context meant a showing by an agency that either (1) *reasonable cause* exists to believe that a violation has occurred or was occurring at the facility to be entered, or (2) the facility to be entered was identified and selected by the agency pursuant to *a pre-existing administrative plan or scheme* for entries, and that the plan or scheme was both derived from "neutral sources" *12/* and prepared prior to the application for the warrant. The *Barlow's* decision explicitly noted that the the "probable cause" language *13/* in the Fourth Amendment did not apply to administrative warrants but only to criminal warrants. *14/* The Court's message in *Barlow's* was equally clear that the government cannot, through its field agents, unfairly "pick on" people. *15/*

E. *Post-Barlow's Caselaw*

Most of the EPA-administered statutes have provisions expressly authorizing the Administrator and his "authorized representatives" to enter a facility and do various things after entry. To date, the EPA-administered statutes have not been successfully challenged on the constitutional issue raised in *Barlow's*. Generally, they have been challenged on the interpretation of particular terms used in those statutes. *16/*

In practice, EPA conducts its affairs as if the rules announced in *Barlow's* also applied, in all instances, to the environmental statutes. However, EPA has never conceded that the *Barlow's* decision is controlling with regard to EPA's rights under all the different statutes it administers. *17/*

Sometimes Congress statutorily provides that an official shall "observe" or "monitor" certain activities. Such a provision may not carry with it a statutory right to enter any particular premises. Instead, it may mean only that those regulated activities, conducted without such monitoring, are unlawful. The "monitored" activities are usually unique. One such case was *Balelo v. Baldridge 18/* where tuna-boat captains were permitted to take porpoises only so long as official observers were aboard.

A case similar to *Barlow's* was *United States v. Coleman Evan Wood Preserving. 19/* There EPA was attempting to enforce its right to enter and conduct post-entry activities by civil action instead of by warrant. Judge Moore granted EPA's motion for an *in personam* order authorizing EPA to enter the premises "at reasonable times for the purpose of conducting response activities under CERCLA" and enjoined the defendants from interfering with EPA's exercise of the rights confirmed by the court's order. Proceeding thus, by civil action, is a method "functionally equivalent" to obtaining a warrant; however, it has greater risks for EPA than warrant proceedings because, in theory at least, it opens the door to broad and distracting discovery, counterclaims, crossclaims, and third-party claims, unless the court, by order, precludes those matters from the proceeding.

STATUTORY PROVISIONS

A. *"Entry Rights" Are Essential for Issuance of Administrative Warrants*

One way that administrative warrants differ from criminal warrants is that an agency must have a substantive right to enter onto premises before a warrant can be issued. *20/* When that point was ruled upon in *Bunker Hill Co. v. EPA, 21/* the court noted that EPA's statutorily granted right of entry was a sufficient basis for EPA using, and the magistrate issuing, an administrative warrant. There is no necessity for the agency to have "implementing regulations" in order to obtain warrants. It need only have and show *statutory* rights of entry onto premises.

B. *No Warrants for "Access" Rights Unconnected with Premises*

A statute may grant a right to "see" an item or "have access" to an item, or even "to inspect" an item, but such provisions may not necessarily and inevitably mean that the "right" is exercisable *at* or *on* premises occupied by the person in possession. It might be that the items to be inspected could be taken to the demanding agency's own offices for examination. The right to inspect documents or records is very susceptible to that drafting flaw. The case of *Midwest Growers Co-op. v. Kirkemo 22/* involved language in the Interstate Commerce Commission (ICC) statute that the court said created only a personal right to see certain records, not an "entry right."

Consequently, a right to "have access" or to "inspect" that is ambulatory *(i.e.,* unanchored to specified premises and inherently exercisable at any location) may not carry with it an express or implied right to physically enter premises. *23/*

C. *No Warrant Where Statute Specifies Other Methods*

In the *Mid-West Growers Co-op.* case, another issue was raised. The court ruled that the ICC statute specified that an injunction is the mechanism by which the right to examine records would be enforced. Therefore, where a statute prescribes an exclusive method for exercising or enforcing an agency's statutory right, that method is the sole means for enforcement, and an application for a warrant will be denied. Likewise, in *In Re Kulp Foundry, Inc., 24/* the court ruled that OSHA, in one statutory subsection, had been given subpoena power as its method for obtaining documents; hence that method was ruled to be exclusive and precluded issuance of a warrant to obtain documents.

There are no such difficulties for practitioners under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), inasmuch as amendments enacted in 1986 expressly provide rights of entry. *25/* Therefore, an administrative warrant is an appropriate and lawful vehicle to enforce entry rights under that statute.

EPA ENTRY PRACTICES

A. *Physical Activities Excepted from Warrant Requirements*

There are four types of activities that seemingly are exempt from the general requirement to obtain a warrant: (1) aerial overflights and observations by passers-by, (2) LIDAR and other sense enhancement devices, (3) open fields inspections, and (4) certain on site observations.

EPA is free to take aerial photos of facilities and to make use of observations made by lawful passers-by. *26/* In undertaking this type of activity, the agency may use the most advanced yet reliable sense enhancement devices for the detection and measurement of the release of pollutants to the environment. One example is the use of LIDAR, a form of radar, that can detect and measure distant air emissions of

particulate matter. In examining LIDAR cases, courts may well apply the same "no search" rationale that was rendered for "beepers" in *United States v. Knotts. 27/*

Federal administrative agencies can also take advantage of some of the "no-warrant-needed" exceptions created in criminal law cases. The "open fields exception" doctrine enumerated in *Oliver v. United States 28/* indicates the Court's willingness to adhere to the common law concept of that exception in a criminal case. There is no reason why that ruling should not equally apply in an administrative law case to obviate an administrative warrant. *29/*

The fourth of these enumerated exceptions is one noted earlier and exemplified by the decision in *Balelo v. Baldridge. 30/* Where certain unique activities are taking place, an official presence is necessary for that activity to be lawful. In *Balelo*, the court ruled that no warrant was required in order to place government observers aboard boats that operate with permits from the Department of Commerce. The court ruled that such "presence" was not a search or seizure. It was, instead, a permit "condition."

B. *Warrantless Non-Consensual Entries -- a Myth?*

EPA reserves its right, even in warrant applications, to contend that its proposed activities come within some caselaw exception to the *Barlow's* requirement for a warrant, but as yet, with the exception of *Public Service Co. v. EPA, 31/* no decision has been concerning an EPA warrantless, non-consensual entry.

Some entry rights are said to be exercisable without a warrant. However, unless self-help (the privileged use of reasonable force to accomplish the entry and to preclude interference) is available, such a warrantless entry right is pragmatically illusory. It can only be enforced, if entry is refused, by the agency's filing a plenary suit for a mandatory injunction for entry--a warrant's functional equivalent. If a law enforcement officer were to accompany EPA personnel asserting warrantless entry rights, self-help for entry would actually be available. But it is unlikely that officers would lend such assistance to EPA on the mere assertion that the agency holds warrantless entry rights.

A triple prong test for determining (usually after the fact) if a statutory right to enter premises without a warrant is constitutional was set forth by the Supreme Court in *New York v. Burger. 32/* In that case, a state statute empowered police to enter and inspect motor vehicle junk yards, regularly and without notice, and to penalize a refusal to allow such entry. No requirement for a warrant was specified. The state's highest court voided the statute, applying its view of the reasoning in *Barlow's*, but the Supreme Court reversed. It ruled that the warrantless entry by two policemen under the statute did not offend the Fourth Amendment because vehicle junk yards were pervasively regulated businesses. Thus, warrants for entry were not required.

C. *Ex Parte Applications Must Not Be Adversary Proceedings*

It is clear that EPA may obtain warrants on *ex parte* application and that such applications may not be turned into adversarial contests. *33/ Ex parte* proceedings to obtain warrants do not deny either procedural or substantive constitutional rights. If they did, then criminal warrant proceedings under Rule 41 of the Federal Rules of Criminal Procedure would also be uniformly unconstitutional.

Some lawyers attack *ex parte* warrant applications by arguing that their clients should be entitled to contest, from the very first, the issuance of such warrants. Were that so, warrant applications inevitably would be turned into adversarial proceedings. However, the Supreme Court indicated its singular aversion to such a result by its decision in *Zurcher v. Stanford Daily News. 34/* The Court in that decision approved the use of warrants to obtain documents and to search premises even though the possessor was not a suspect. It demonstrated clearly its preference for a warrant issued *ex parte* over the issuance of a subpoena that might well entail adversarial proceedings.

It has been clearly ruled that it is not within a magistrate's discretion to allow a non-party to intervene and be heard in agency *ex parte* warrant application proceedings. In the case of *In Re S.D. Warren, 35/* the court stated that "an adversary proceeding... could only result in an unreasonable and unnecessary burden." *36/*

Some lawyers contend that execution of EPA-obtained warrants (mainly those issued under

section 104 of CERCLA, 42 U.S.C. 9604) will involve constitutional "takings"; *37/* hence, an opportunity to be heard should be required before such warrants issue. Even conceding the premise, the conclusion remains false. The fact is that the post-entry remedy contained in the Tucker Act 38/ adequately protects any substantive due process interest, even if one were to assume that a constitutional "taking" would occur under the warrant.

D. *Advance Notice to Possessor Not Required to Obtain a Warrant*

EPA is not required to give advance notice of an inspection to a plant or its personnel. The right to proceed *ex parte* obliterates all such notice requirements. Similarly, notice to a possessor of EPA's inspection under a warrant or of EPA's *ex parte* application for a warrant is never required. Advance notification would only encourage a possessor to attempt to intervene in the *ex parte* proceeding, making it an adversarial and contested proceeding, contrary to its basic structure. *39/*

E. *Request for Possessor's Consent also Unnecessary*

As a matter of courtesy, but not because of regulatory, statutory, or caselaw requirements, EPA personnel usually ask the possessor's express consent to entry, search, inspection, and/or sampling. However, any form of consent other than "yes" creates potential problems and therefore, EPA will not accept it. The statutory right overrides the need for consent from anyone. Even if EPA, as a matter of courtesy, usually tries to "work something out" with the possessor, that never means that it is legally required to do so.

F. *Efforts to Negotiate Terms with Possessor Unnecessary*

A magistrate or court may inquire whether an agreement might be reached between the agency and the possessor of premises to obviate a warrant. EPA does attempt to gain consent when it is quick and certain, but the law does not require an attempt to negotiate consensual entry. Such requirement would be tantamount to EPA's foregoing its statutory rights. Obviously, EPA will pursue whatever path leads to the easiest means of entry. In some cases negotiation is that path; in others, it isn't.

G. *Refusal of Consent by Possessor also Unnecessary*

Environmental statutes confer a substantive legal right, power, and authority upon designated EPA representatives to enter premises and to conduct post-entry activities there. The law does not require EPA to show that entry has been refused in order to obtain a warrant. The existence of the substantive right to enter yields, by itself, a concomitant right to have judicial confirmation of that right by issuance of a warrant. Sometimes an issuing magistrate mistakenly may regard "refusal of consent" as some kind of indicator whether "reasonable cause" exists to issue the warrant (a *non-sequitur*, admittedly, but not an atypical one).

H. *Need for Surprise Unnecessary*

Some have argued that, absent a demonstrated need for surprise, the agency must give the possessor notice of the warrant proceedings and of the prospective entry, or else be denied the warrant. The rationale for this view is rarely articulated. The contention is spurious. It interposes the necessity of a showing of "need" by EPA before using *ex parte* proceedings. This erroneous contention has been fairly well put to rest by the decision in *Bunker Hill Co. v. EPA. 40/*

I. *Time Limits for Warrants -- Mainly "Prudential" Rules*

A ten-day duration is imposed on criminal warrants under Rule 41(c)(1), primarily to insure that probable cause continues to be present to support the warrant and to prevent staleness. No such explicit duration limit is imposed upon administrative warrants for the very pragmatic reason that more sophisticated types of activities, taking longer, must usually occur after an EPA entry. Magistrates typically insist upon imposing time limits that are calculated by estimating the time necessary to accomplish the proposed activities. Typically also, they will set an expiration date for the warrant to insure that a renewed or new warrant, based upon updated information, is obtained for further activity even if it is precisely the same activity as allowed under the initial warrant (*e.g.*, sampling test wells drilled months earlier in an initial entry). Various termination dates are inserted in warrants depending on the activities involved. Periodic renewal of warrants can be required. In fact, that procedure strikes a much

better balance then would injunctive proceedings in a plenary civil action (or proceedings under the All Writs Act *41/*) because of the very short and expedited nature of administrative warrant proceedings.

J. *Re-Entries under Warrants*

EPA administrative warrants typically provide for re-entries prior to the expiration date of the warrant because laboratory analyses, such as testing for hazardous substances and their concentrations, often interrupt the post-entry activities. No return is required on the administrative warrant until after the final entry.

K. *Displaying Credentials*

Some EPA-administered statutes mention the presentation of credentials; others do not. However, as a matter of practice, EPA employees usually do present their EPA credentials at the time of entry. The credentials only authenticate the EPA employee's representation that he or she is a federal official authorized to enforce the environmental laws. An administrative warrant however, also "credentializes"--so much so that "credentialization" can be considered one prime function of an administrative warrant.

L. *Statement of Purpose upon Initial Entry*

Some EPA-administered statutes specify that written notice must be presented to the possessor of the premises entered, but some do not. Usually an EPA official will verbally explain, in general terms, the post-entry activities he or she expects to be performing. However, the inspector will avoid giving an occupant the opportunity to learn the precise focus (as opposed to the general aspects) of the inspection, particularly if that information would enable the possessor to misdirect the inspection or to contrive an appearance of compliance.

M. *Motions for Return of Items and Supression of Evidence*

In *B&B Chemical Co., Inc. v. United States, 42/* the court ruled that a complaint, filed after an EPA administrative warrant was executed, should be dismissed as moot because the prospect that EPA would later attempt to use the gathered information in a judicial or administrative action against the possessor was too speculative and remote to make the current action a live Article III controversy. The lower court ruled that it lacked jurisdiction to quash a warrant that had already been issued and was in the process of being executed--a demonstrably correct decision.

N. *Bivens Claims Based on Administrative Entry Orders*

Neither a *Bivens* issue *43/* nor evidence supression issues have been raised to date regarding EPA entries, even in *Industrial Park Development Co. v. EPA, 44/* arising in Pennsylvania. The matter is otherwise regarding inspections and evidence supression in OSHA cases. *45/*

The signatory of an EPA-issued order that contains provisions directing the premises' possessor to allow EPA personnel to enter is invariably confronted by the *Bivens* issue. In such a case, the signatory may be acting in excess of lawful authority, and, if harm is caused, personal liability may ensue. An evidence suppression argument is equally likely because an order's aura of official coercion arguably vitiates any voluntary waiver or consent. *46/* Assuming that some warrantless exception is wholly unavailable, without the waiver or consent argument an order's entry provisions will prove to be unlawful. In such a case, there may be a violation of Fourth Amendment rights if and when physical entry is made under the administrative order. For these reasons, the 1986 amendments to CERCLA, which purport to provide for entry by means of an administrative order (42 U.S.C. 9604(e)(5)), may prove to be unconstitutional.

O. *Good Faith Belief that Warrant Is Valid*

The Supreme Court decision in *United States v. Leon 47/* that no evidence obtained in violation of the Fourth Amendment will be excluded where there has been good-faith reliance on a facially valid warrant will certainly be relied on by EPA and other federal agencies to justify their use of information obtained pursuant to an administrative warrant. The very existence of this exception to the prophylactic exclusionary rule will almost necessarily moot out most complaints filed for the supression/exclusion of evidence obtained under an administrative warrant.

P. *Dispossessing Post-Entry Acts -- "Takings" under Warrants*

Under CERCLA provisions, EPA's exercise of its removal and remedial rights, because of the duration and/or displacing aspects of activities, in some instances may be ruled a compensable "taking." But that does not justify delay in issuing a warrant. It is, at best, a basis for after-the-fact filing of a complaint in the U.S. Court of Claims for just compensation. Claims Court proceedings for such compensation need not precede the operative event alleged to be a compensable "taking." *48/*

CONDITIONS RESTRICTING EPA ACTIVITIES ATTACHED TO CONSENT

A. *Signing/Accepting "Passes," "Logs," "Waivers," "Indemnity Agreements," "Releases," or Similar Items*

Sometimes attempts are made by the possessors of premises to restrict EPA's post-entry activities by making the signing of some sort of document a condition to the consent of the possessor to EPA's entry. *49/* EPA resists such efforts.

EPA inspectors may not sign or agree to any such matters. Signing something can not properly be made a condition to EPA's exercise of its rights to enter, search, inspect, or investigate.

Insisting upon the signing of any such contractual item operates as refusal of consent and as insistence on the presentation of a warrant. Typically, upon refusal of consent, EPA will seek an administrative warrant. The warrant application and supporting affidavits are available to the public in the court file after the warrant has been executed and a return (a written report and inventory) made on the warrant.

B. *Confidentiality or Secrecy Agreements*

EPA representatives will not sign any agreement to hold as confidential what is observed or discovered during an inspection or investigation. EPA will facilitate the making of a claim under 40 C.F.R. Part 2, Subpart B, for a claimant who asserts "business confidentiality" for submitted records. However, insistence that EPA representatives sign such an agreement effectively operates as a refusal of consent, and EPA's response will be to obtain a warrant for entry and post-entry activities. *50/*

C. *Restrictions on Photographs or Other Mechanical Recordations*

Attempts to restrict or inhibit post-entry activities by EPA are sometimes directed at photographs, although the same principles apply to any mechanical method of recording impressions of perceived conditions. Mechanical recording devices such as cameras are the only reasonable method for capturing a communicable impression of then-existing conditions, many of which may be wholly transitory. The right to use any mechanical recording device inheres in EPA's right to inspect. EPA claims, for example, the right to use its own cameras, develop its own film, and to make its own prints, regardless of the presence or absence of consent by the possessor to such activity. *51/* EPA will grant a request to review matters photographed during post-entry activity in order to afford the possessor of the premises an opportunity to assert claims of confidentiality under 40 C.F.R. Part 2, Subpart B.

D. *Revocation of Consent*

A possessor of premises may give initial consent to an EPA entry but try to revoke that consent after EPA has entered and begun its activities. While the issue of the possessor's power to revoke consent is open to debate, EPA should have the right to complete its inspection once it has begun without interference based on alleged revocation of consent. *52/*

E. *Safety Gear and Procedures*

Generally, EPA representatives use the same safety equipment that operators of the facility use; but EPA has the right to decide not to undergo the safety training the operator may require of its workers. *53/* Insistence on such training is, in effect, refusal of consent to EPA's entry, and EPA's response will then be to obtain an administrative warrant to achieve its entry.

F. *Obtaining a Copy of the Inspector's Notes*

Some possessors try to inveigle an agreement from EPA that they may see, read, or copy notes made by an EPA inspector. EPA does not allow such access although the possessor may submit a request under the Freedom of Information Act to which EPA has ten days to respond. While inspectors may point out various items that the possessor should re-check for compliance purposes, EPA's inspecting

representatives are never authorized to tell a possessor that there are no violations. The intricacies of EPA-administered statutes and regulations frequently do not facilitate reliable on-the-spot opinions.

AUTHORIZED POST-ENTRY ACTIVITY

A. *Scope of Authorized Activities after Entering*

A rule of thumb is that the language of the statute, fairly and straight-forwardly construed, determines the nature and extent of EPA's post-entry activities, even if the statute may authorize activity amounting to a "taking." Administrative warrants presuppose that a right to enter is statutorily conferred and that a concomitant right to search (*i.e.*, to verify by physically checking as opposed to naively taking the word of the possessor) likewise exists.

Occasionally, EPA statutes are tested as to the scope of activities which they authorize. One case, *Mobil Oil Co. v. EPA, 54/* resulted in a ruling that the sampling of in-house, as opposed to end-of-pipe, process effluent was within the purview of EPA's inspection and sampling rights conferred by section 308 of the Clean Water Act, 33 U.S.C. 1318. In another case, *In Re Bunker Hill Co., 55/* the court explicitly ruled that EPA's right to inspect included the right to take photographs (that can be subjected to confidentiality claims under 40 C.F.R. Part 2, Subpart B) of the facility and equipment. EPA's right to obtain documents by means of a warrant was challenged in *Bunker Limited Partnership, 56/* but right now that seems beyond dispute under 42 U.S.C. 9604(e)(6). *57/*

Language varies from statute to statute as to what activities EPA may perform after entry. However, the typical word "inspect," "inspecting," or "inspection" that appears in each of the statutes includes the right to record by sampling, photographing, tape recording, graphing by electronic devices with a taped readout, or other methods, depending upon the matter to be inspected.

Somewhat similar to the *In Re Kulp Foundry* decision *58/* are two opinions that contort the subpoena analogy found in *See v. Seattle 59/* into a purported requirement that, for nonconsensual entry, an agency must obtain a subpoena (in addition to a warrant), pinpointing and describing the documents or records to be perused. The two decisions are *Bunker Limited Partnership v. United States 60/* and *United States v. Stanack Sales Co. 61/* In each of these cases, the court misunderstood the language concerning the subpoena analogy that was used in the *See* decision.

Apart from all else, the practitioner must remember that subpoenas are commands to a possessor, who then must himself search and segregate the subpeonaed material, while warrants do not command or require a possessor to do anything.

B. *Splitting Samples*

Three of the EPA-administered statutes specify that, if requested, split samples must be provided by EPA. These are the Resource Conservation and Recovery Act (RCRA) section 3007(a), 42 U.S.C. 6927(a); CERCLA section 104(e), 42 U.S.C. 9604(e); and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) section 9(a), 7 U.S.C. 136g(a). Those who support such provisions argue that a facility should be able to challenge the accuracy of any government testing and analysis at government expense.

C. *Copying Versus Seizing Documentary Items*

The practice in executing warrants issued under Rule 41 of the Federal Rules of Criminal Procedure is to seize and carry away documents. In some instances, that practice can hamstring an ongoing enterprise. Apparently, concern in that regard has prompted enactment of provisions in various statutes that EPA may peruse all documents subject to the warrant, but must then copy on-site those records it wishes to seize and remove from the premises.

D. *Nonconsensual Searching and Screening*

Occasionally, an argument is made, especially in regard to documents, that the statutory provision at issue does not *explicitly* grant the right to search even if one holds a warrant. However, statutes rarely explicitly authorize a search in exact words. May the government verify, by its own search, that it has found (and possesses) all documents or other tangible items that are relevant? Must the government naively grant a possessor a pre-emptive opportunity to sanitize the product of the search, or take the word of the possessor regarding what items are relevant

and what items need not be surrendered because they are confidential? The Supreme Court has stated that there is no "special sanctity in papers [vis-a-vis other tangibles] . . . to render them immune from search and seizure" when they fall within traditional principles applicable to warrants. *62/*

REDRESS/SANCTIONS FOR HAMPERING EPA ENTRIES/INSPECTIONS

A. *Refusals of Consent for Entry*

EPA's typical response to refusals of consent to entries or to the conditioning of consent has been for the agency to seek a warrant or a functional equivalent thereto.

Some statutory provisions, such as those in FIFRA and the new section 104(e)(5) of CERCLA, purport to penalize by civil penalty a refusal to permit EPA entry when EPA's effort to enter is lawfully made. Such provisions presently force possessors to guess if EPA may enter without a warrant. *63/* These penalty terms may be invalid in the context of a warrantless entry, but valid when EPA shows up with a warrant.

B. *Warrant Situations Where Refusals Occur*

All warrants are executed—they need not be served nor enforced as such. Service is not essential to the legal operation of an administrative warrant because it is not encumbered by Rule 41 but only by the "copy-delivery" terms (if any) contained in the warrant itself. Service of an administrative warrant merely gives notice. Execution of the warrant is by physical force, if necessary. For that reason, EPA usually has one or more Deputy United States Marshals accompany EPA personnel on an entry under a warrant. Where such is not the case, the issue becomes whether in the case of refusal EPA will use self-help or, instead, will resort to contempt proceedings.

In *In Re Bunker Hill Co., 64/* the operator of the facility obstructed EPA's entry and activities in the face of a judicially issued warrant. A Motion for Contempt was then filed. Had a Deputy United States Marshal been present, he could have made an arrest since interference with a civil administrative warrant results in criminal liability under 18 U.S.C. 111, 1501, and 1509. Such a warrant is, after all, a court order.

C. *Use of Reasonable Force*

The use of reasonable force to execute a warrant issued under Rule 41 is familiar to everyone. There seems to be no sound analytical reason why the same principle does not apply to administrative warrants.

FALLACY OF ENTRY/CONSENT/ACCESS DIRECTED BY AGENCY ORDER

A. *Unilateral Orders*

A unilateral administrative order (as yet not judicially enforced) is *not*, by itself, the functional equivalent of a judicially issued warrant required under the Fourth Amendment. As mentioned above, the language of the new CERCLA section 104(e)(5) may imply otherwise, and if so, that section may not stand up to constitutional challenge. *65/*

B. *Entries Under Provisions in Agreed Orders*

Few quarrel with the legal efficacy of a respondent's agreeing to an EPA order whose provisions include an irrevocable consent to EPA entries. Such a respondent thereby consents to such entries and to related consequent activity. In such a case, the issue should be analyzed in terms of the existence and extent of the consent rather than of EPA's powers.

Some point to *Nicolet v. Eichler 66/* as contradicting this analysis. In *Nicolet*, a second CERCLA section 106 order superseded a prior order and basically contained provisions that only commanded the respondent possessor to allow EPA to come onto the premises. The plaintiff sued to enjoin the enforcement of the second order and EPA counterclaimed for enforcement. Properly, the district court reviewed EPA's order, applying the arbitrary/capricious standard of review approved in *Citizens to Preserve Overton Park v. Volpe 67/* for nonadjudicative agency decision-making. It ruled that the order itself, plus the various documents underlying it that the agency had considered before issuing the order (the agency's informal administrative record), supported the agency's commands set out in the section 106 order. The court concluded that the order met the applicable criteria of the Administrative Procedure Act, 5 U.S.C. 706(2)(A),--the action of the agency had not been arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with law;

hence the court specifically enforced the order's entry provisions. The Court's confirming order (but *not* EPA's order) amounted to the functional equivalent of an administrative warrant.

BYSTANDER OR THIRD-PARTY PREMISES

Just as third-party premises constitutionally may be entered under a Rule 41 warrant, as was the case in *Zurcher v. Stanford Daily News,* (to collect evidence of a crime), *68/* the "entrable premises" under some environmental statutes include those premises adjacent or related to the precise focus of EPA's entry and post-entry activities. That occurs mainly under CERCLA where EPA sometimes needs entry to premises other than the location of the initial release or threat. Such other premises may be an area that must be inspected to determine the outer limits of the area of contamination or it may be an area needed for staging and maneuvering. Whether or not he is viewed as a suspected potentially responsible person (PRP) or possible respondent by EPA, for purposes of analysis here, an adjacent premises possessor is called a "bystander premises possessor," or BPP.

The BPP problem has been addressed to some degree in the 1986 amendments to CERCLA. New section 104(e)(3)(D) identifies as entrable any premises where entry is needed to effectuate part or all of a response action. That right-of-entry provision should solve most BPP problems under that statute.

The involvement of a non-consenting BPP who cannot properly be made a respondent in an EPA-issued order inevitably raises the potential of eminent domain or taking claims. If it be argued that the terms of the statute authorize EPA to command a BPP to allow some third party (who may be more a miscreant than an agent or "authorized representative" of EPA) to enter upon the BPP premises, then such a statute and such entry attempts are likely to be attacked by BPPs under the Fourth and Fifth Amendments. Using a BPP's land seems different from compelling a BPP's cooperation as a citizen in providing evidence and the like. Entering land is, however, essential to abating threats from releases or from contaminated facilities. *69/* In any case, the entry of BPP land can amount to public affirmative use of BPP property and a true "taking."

Since warrants under Rule 41 of the Federal Rules of Criminal Procedure involving third party premises are valid, one can argue that administrative warrants must also be valid for such purposes so long as the statute can be shown to create a substantive right to enter the BPP's premises and to perform post-entry activities there. Absent such a right, only the All Writs Act or the new section 104(e) provision of CERCLA appears to be readily usable.

ALL WRITS ORDERS ISSUED TO AID ENTRIES OR RESPONSE ACTIONS

A court order, or a "writ," issued pursuant to 28 U.S.C. 1651, has been used to aid an EPA entry or post-entry activity. Orders issued pursuant to that statute may combine and employ any and all judicial prerogatives within the ambit of Article III. Thus, a section 1651 "writ" can both authorize government officials (or even third persons) to do acts and simultaneously command whoever may suffer an incursion to allow and cooperate actively with such authorized officials. *70/*

Once a court has exercised jurisdiction by issuing an administrative warrant, the court may, if it later becomes necessary, use the All Writs Act in aid of its jurisdiction. Therefore, if extended activities on certain premises will occur or if the cooperation of the possessor of the premises will be required (even if only to keep people away from the survey stakes, sample grids, or equipment of EPA's contractor), then an order or writ may be issued to "aid" the court's jurisdiction. This is particularly true where a warrant has been executed and returned. In such a case a writ can "piggy-back" onto the previous warrant jurisdiction and be in "aid" of it. *71/*

EFFECT OF FEDERAL RULES OF CIVIL PROCEDURE ON EPA ENTRIES AND WARRANTS

A. *Administrative Warrants*

While Rule 41 of the Federal Rules of Criminal Procedure governs aspects of warrants obtained upon probable cause to enter premises for evidence of or fruits of a crime, the Federal Rules of Civil Procedure do not expressly address administrative warrants at all. The courts instead, on a case-by-case basis, have

articulated procedures that may be used for obtaining administrative warrants. For the most part, these procedures parallel those under Rule 41. For example, as stated above, it is clear that it is entirely proper for EPA to apply *ex parte* for an administrative warrant.

It is equally clear that an injunctive order enforcing a statutory right of entry may be obtained only by filing a summons and complaint. The 1986 amendments to CERCLA contain provisions that restrict judicial review, thereby curtailing the risk that, on a summons and complaint for entry, collateral issues will be raised.

B. *Writs Under the All Writs Act*

Traditionally, one applies for a writ under 28 U.S.C. 1651 by filing a Petition *ex parte*, and having a Show Cause Order issue thereon. One can also seek a writ by filing a summons and complaint. All Writ proceedings are controlled by the Federal Rules of Civil Procedure, but their specialized nature tends to induce the courts to keep such proceedings abbreviated and narrow.

CONCLUSION

Judicially issued administrative warrants, for the most part, have proven to be a workable method for implementing the necessarily far-reaching post-entry statutory rights that environmental inspection and detection of non-compliance involve. To the extent that such mechanisms are recognized as being merely a permutation of warrants used in criminal investigations, the problems they pose should be manageable, if not familiar. They, and the entry rights which they symbolize, will undoubtedly remain sorely needed in the fight to discover and protect the community from the throw-away practices of our callous and indifferent selves.

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FOOTNOTES

1/ An example of warrantless entry authorized by statute appears in Donovan v. Dewey, 452 U.S. 594 (1981).

2/ *Black's Law Dictionary* 1756 (4th ed. 1968).

3/ *E.g.*, the statutory "rights" may be construed so as to preclude resort to a warrant as in Midwest Growers Co-op. v. Kirkemo, 533 F.2d 455 (9th Cir. 1976), or may be narrowly interpreted anomalously as happened to the Occupational Safety and Health Administration in *In Re* Kulp Foundry, Inc., 691 F.2d 1125 (3d Cir. 1982).

4/ *See* Donovan v. Hackney, Inc., 769 F.2d 650 (10th Cir. 1985), and Donovan v. Mosher Steel Co., 791 F.2d 1535 (11th Cir. 1986).

5/ *See* Bunker Limited Partnership v. United States, No. 85 - 2133 (D. Idaho 1985), *dismissed as moot*, 820 F.2d 308 (9th Cir. 1987).

6/ *See* Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211 (D.C. Cir. 1981); Bunker Hill Co. v. EPA, 658 F.2d 1280 (9th Cir. 1981); *accord Midwest Growers*, *supra* note 3.

7/ Some courts point to 28 U.S.C. 636. *See* Marshall v. Chromalloy Am. Corp., 589 F.2d 1335 (7th Cir. 1979), and *In Re* Quality Products, Inc., 592 F.2d 611 (1st Cir. 1979). That view hardly covers all that our federal courts have done in the matter of warrants. A *caveat* must also be noted: *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), authored by Justice White, is very much the descendent of a number of cases such as See v. City of Seattle, 387 U.S. 541 (1967), and, decided the same day, Camera v. Municipal Court, 387 U.S. 523 (1967). Those major opinions were also written by Justice White. While the rationale of such earlier cases should not be overlooked, they should be tempered by the more precise focus in Justice White's opinion in *Barlow's*.

8/436 U.S. 307 (1987). *Queries*: Under existing law do state inspectors have a legal right to obtain *federal* administrative warrants for

entry and post-entry activity from a federal court or magistrate, at least under statutes such as 42 U.S.C. 6927(a) (RCRA section 3007(a)), 33 U.S.C. 1318(c) (CWA section 308(c)), and 42 U.S.C. 7414(c) (CAA section 114(c)), which *arguably* purport to confer *a federal* right of entry *directly* upon described state officials? Can federal officials obtain administrative warrants from state courts?

Opinion: As to both questions, probably "yes" although nobody as of yet seems to have tried.

Rationale: Fed. R. Crim. P. Rule 41(a), along with 18 U.S.C. 3101-3113, arguably purports to *empower* judges of state courts of record to issue warrants for Rule 41 purposes (*i.e.*, criminal law enforcement) when sought by federal officials. By a parity of reasoning (*i.e.*, the *Barlow's* decision was based on principles under the federal Constitution and thus is binding on all states), those same state judges are "empowered" to issue administrative warrants to federal officials. (The foregoing reasoning is an alternate to the view that there is really no "federal power" conferred as such on state judges by Rule 41 and instead, *neutral scrutiny* by a state judge of a proposed entry by federal officials merely satisfies the Fourth Amendment *condition precedent* for issuance of a warrant.)

At least one Justice seemingly would have little problem with state judges issuing federally valid *administrative* warrants. In *Griffin v. Wisconsin*, 483 U.S. 868 n. 5 (1987), Justice Scalia noted that the warrant required in *Barlow's* arguably would not have to be "judicially issued." That intimates a nonjudicial official could issue a federal administrative warrant. *A fortiori*, a judge of a state court of record would implicitly qualify under that view equally as well as he/she qualifies explicitly under Rule 41.

The reverse situation of an administrative warrant federally issued (by a federal magistrate or district judge) *to a state official* has not yet been discussed or raised. The opinion expressed above is predicated simply upon the *existence* of a federal statutory right of entry held by some state officials under the cited statutes, and the fact that federal courts have jurisdiction concerning such rights under Article III and 28 U.S.C. 1331 (federal question jurisdiction). A federal warrant to confirm and validate a federal right (regardless of who holds it) seems clearly within a federal court's jurisdiction.

9/ *See City of Seattle, supra* note 7, and *Midwest Growers Co-op v. Kirkemo*, 533 F.2d at 455 (9th Cir. 1976).

10/ *See* CAB v. United Airlines, 542 F.2d 394 (7th Cir. 1976), where personnel from the Civil Aeronautics Board without a warrant, but with a letter request (arguably equivalent to a subpoena) in hand, showed up at United's office and requested entry, based on a statutory right, in order effectively to rummage through United's files. United declined. The CAB filed plenary suit for injunction. Implicitly, the resulting decision was a precursor of *Barlow's, supra* note 7. The court ruled that the letter request issued by the agency was no adequate substitute for a judicially issued warrant, even if the letter were functionally equivalent to an administrative "subpoena."

11/ During the last two weeks of May 1978, in addition to *Barlow's*, the Supreme Court also handed down Zurcher v. Stanford Daily News, 436 U.S. 547 (1978), authored by Justice White as well as Michigan v. Tyler, 436 U.S. 499 (1978). A salient point is that these three cases, all involving an in-depth consideration of administrative entry problems, were decided by the same nine justices in the same Supreme Court term.

12/ The "plan" or "scheme" was not itself required to be "neutral" or random, but the *basis for the plan* was required to be "neutral," thus preventing site selections by persons in the field.

13/ The use of the term "probable cause" should be scrupulously avoided in civil matters. It inevitably results in garbled thinking and confused analysis. "Reasonable cause" or some similar phrase should be used.

14/ Some purists may argue that the Court did not really say that. In practical effect, the result is the same. *See* New York v. Burger, 482 U.S. 691 (1987).

15/ That message was reiterated in LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985), where the court ruled that immigration officials could not engage in warrantless "area" searches for illegal aliens in farmer-provided housing shelters or huts located on various farms in Washington

state, even when the farmer-possessor consented thereto.

16/ *E.g.*, whether "authorized representatives" as used in a statute includes a commercial company and its employees with whom EPA has a contract under which the private company performs inspections for EPA. *See* ALCOA v. United States, No. 80-1178V (W.D. Wash. 1980), and United States v. Stauffer Chemical Co., 464 U.S. 165 (1984).

17/ Only one decision has indicated that EPA is *required* to follow the *Barlow's* ruling – Public Service Co. v. EPA, 509 F. Supp. 720 (S.D. Ind. 1981). EPA's reasons for observing *Barlow's* principles in practice are twofold: first, it is less resource consumptive in the long run to obtain a warrant than it is to litigate the issue under nine different statutes; second, an official of the government, in many instances, is entitled as of right to the issuance of a warrant that judicially confirms his authority, in his official capacity, to exercise a substantive right to enter and to conduct post-entry activities. A valid warrant gives him absolute immunity from liability for activity conducted in conformity with the warrant.

18/ 724 F.2d 753 (9th Cir. 1982).

19/ No. 85-211-CIV-0-16 (M.D. Fla. June 10, 1985).

20/ Annotations on administrative warrants appear in 19 A.L.R. Fed. 736 – DEA warrants under 21 U.S.C. 880; 25 A.L.R. Fed. 836 – warrants regarding liquor dealers under 26 U.S.C. 7607; and 54 A.L.R. Fed. 474 – OSHA warrants under 29 U.S.C. 657(f).

21/ 658 F.2d 1280 (9th Cir. 1981).

22/ 533 F.2d 455 (9th Cir. 1976).

23/ A right of entry may be implicit. One example is found in Blackie's House of Beef, Inc. v. Castillo, 659 F.2d 1211 (D.C. Cir. 1981).

24/ 691 F.2d 1125 (3d Cir. 1982).

25/ 42 U.S.C. 9604(e).

26/ Dow Chemical Co. v. EPA, 749 F.2d 307 (6th Cir. 1984), *aff'd*, 106 S.Ct. 1819 (1986). *See also* Florida v. Riley, 57 U.S.L.W. 4126 (U.S. Jan. 23, 1989); United States v. Allen, 633 F.2d 1282 (9th Cir. 1980); and 56 A.L.R. Fed. 772.

27/ 460 U.S. 276 (1983).

28/ 466 U.S. 270 (1984). *See also* United States v. Dunn, 480 U.S. 294 (1987).

29/ *See, e.g., Pennsylvania v. Lutz*, 516 A.2d 339 (Pa. 1986), *vacated and remanded*, 55 U.S.L.W. 3643 (1987). In that case, the defendant was charged with several criminal violations, including obstructing an employee of the Pennsylvania Department of Environmental Resources (DER) and obstruction of justice. The charges stemmed from an incident that occurred when two DER employees entered the defendant's land without warrants to check reports of the presence of solid waste. The defendant refused to allow the search, confiscated a camera and sample bottles, and ordered the employees off the property. (The following day the search was conducted on consent.) The Pennsylvania Supreme Court subsequently affirmed a trial court order dismissing the charges on the ground that the warrantless search provisions of the Pennsylvania Solid Waste Management Act were violative of the Fourth Amendment. The case ultimately was appealed to the U.S. Supreme Court but, after *certiorari* was granted, it was remanded to the Supreme Court of Pennsylvania for further consideration in light of *Dunn, supra* note 28. The Pennsylvania Supreme Court then in turn remanded the matter to the Westmoreland County Common Pleas Court for trial, where on January 11, 1989, the defendant was convicted on two counts each of obstruction of justice and harrassment.

30/ 724 F.2d 753 (9th Cir. 1982).

31/ 509 F. Supp. 720 (S.D. Ind. 1981).

32/ 482 U.S. 691 (1987). The three-prong test for warrantless entry on premises of "closely regulated" businesses explicated in *Burger* is (1) that there exists a "substantial government interest" justifying the statutory "close regulation" under which the entry is made; (2) that the warrantless entry is necessary to further the regulatory scheme; and (3) that the "certainly and regularity" of the inspection program described in the language of the statute provides "a constitutionally adequate substitute for a warrant," *i.e.*, the statute itself informs the public at large that those who engage in such a business will be so closely regulated *and inspected* that they cannot expect to have privacy on premises where such business is conducted.

33/ *See* Bunker Hill Co. v. United States, 658 F.2d 1280 (9th Cir. 1981); B&B Chemical Co. v. United States, 806 F.2d 967 (11th Cir. 1986); and National Standard Co. v. Adamkus, No. 87C5516 (E.D. Ill. 1988).

34/ 436 U.S. 547 (1978).

35/ *In Re* S.D. Warren, 481 F. Supp. 491 (D. Me. 1979). *See also* Ingersoll-Rand Co. v. Donovan, 540 F. Supp. 222 (M.D. Pa. 1982).

36/ The characteristics of an *ex parte* proceeding are rarely explored. Primarily, it is a right of an agency to proceed and obtain a warrant without having that process impeded by intervention of any other person. *See, In Re S.D. Warren, supra* note 35. One who seeks to take judicial action against the warrant properly should commence his own separate civil action by filing a complaint under Rule 3 of the Federal Rules of Civil Procedure after execution of the warrant has begun. The suggestion made in the *B&B Chemical Co.* decision, *supra* note 33, that the matter should be filed with the same magistrate who issued the warrant is incorrect. A filed matter can be "referred" to a particular magistrate only by order of the court, as is the case with any civil action. The court should neither allow nor recognize any less formal challenge to the warrant proceeding, such as interloping "motions" to quash, cancel, or recall a warrant, none of which is legally recognized by the federal rules. Such a civil action, being much like a Return Of Property Motion under Rule 41, should entail only very abbreviated proceedings. *See National Standard Co., supra* note 33.

37/ The Administrative Procedure Act (APA) in 5 U.S.C. 704 requires that there be no other adequate remedy in a court before a deprivation such as a taking may be subjected to "early" judicial review under the APA.

38/ 28 U.S.C. 1491.

39/ *See* Zurcher v. Stanford Daily News, 436 U.S. 547 (1978), and Hannah v. Larche, 363 U.S. 420 (1960).

40/ 658 F.2d 1280 (9th Cir. 1981).

41/ 28 U.S.C. 1651.

42/ 806 F.2d 967 (11th Cir. 1986).

43/ The Supreme Court in Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), ruled that a federal constitutional tort had occurred when unknown FBI agents burgled private premises clandestinely and without a warrant. Most feel that the case established a rule that intentional government conduct, reasonably recognizable as a violation of some person's constitutional rights, is a constitutional tort separate from a statutory wrong under 42 U.S.C. 1983. Whether *Bivens* as a practical matter will survive the Court's more recent decision in Anderson v. Creighton, 97 L. Ed 2d 523 (1987), remains to be seen.

44/ Unpublished. (E.D. Pa. 1985).

45/ *See* 67 A.L.R. Fed. 724.

46/ *See* United States v. Molt, 589 F.2d 1247 (3d Cir. 1978); Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979); United States v. Miller, 589 F.2d 1117 (8th Cir. 1978); United States v. Dennis, 625 F.2d 782 (8th Cir. 1980); and United States v. Kampbell, 574 F.2d 962 (8th Cir. 1978).

47/ 468 U.S. 897 (1984).

48/ Ruckelshaus v. Monsanto Corp., 467 U.S. 986 (1984), and United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985). This issue was addressed in the 1986 CERCLA amendments which, in effect, confirmed eminent domain power in EPA for CERCLA purposes.

49/ *See* United States v. Bunker Hill Co., No. 2-75-57, 10 Env't Rep. Cas. (BNA) 2071 (D. Idaho 1976); *see also In Re* Bunker Hill Co., No. 80-2087, 15 Env't Rep. Cas. (BNA) 1063 (D. Idaho 1980) (conclusion of law No. 9), *aff'd on all points*, 658 F.2d 1280 (9th Cir. 1981).

50/ *See In Re* Bunker Hill Co., *supra* note 49 (conclusion of law No. 9).

51/ If any restriction on EPA taking of photographs or other use of mechanical recordings is insisted upon prior to or at the time of entry, then that is treated as a refusal of consent, and EPA can obtain a warrant to permit it to conduct the inspection, with specific references to such recording devices as it expected to use. EPA's right to photograph during inspection without restraint has been authoritatively confirmed in *In Re* Bunker Hill Co., *id.* (conclusions of law No. 10 and No. 11), which were totally affirmed.

52/ Consent revocation (*vel non*) and the effect of putative revocation have evoked diverse

appellate views, as reflected in Mason v. Pulliam, 557 F.2d 426 (5th Cir. 1977), and United States v. Homburg, 546 F.2d 1350 (9th Cir. 1977), holding that consent is revocable and revocation is legally effective to restrain government action. *Contra*, United States v. Hezbrun, 723 F.2d 773 (11th Cir. 1984); United States v. Haynie, 637 F.2d 227 (4th Cir. 1980); and United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973), which state the view that, in some instances, once consent is given it is irrevocable, or that attempted revocation of consent is inoperative.

53/ *In Re* Bunker Hill Co., *supra* note 49 (conclusion of law No. 11).

54/ 716 F.2d 1187 (7th Cir. 1983).

55/ 15 Env't Rep. Cas. (BNA) 1063.

56/ Bunker Limited Partnership v. United States, No. 85-2133 (D. Idaho 1985). The operator of the facility argued that EPA cannot obtain documents under a warrant, despite EPA's holding of a civil warrant for such purposes as well as the existence of an underlying statute that indicates to the contrary. *See* 1 Nat'l Envtl. Enforcement J. 24 (Nov. 1986).

57/ As to documents being reached by a criminal search warrant under Fed. R. Crim. P. 41(h), *see* Donovan v. Burlington Northern, Inc., 694 F.2d 1213 (9th Cir. 1983); Hern Iron Works, Inc. v. Donovan, 670 F.2d 838 (9th Cir. 1982); United States v. Washington, 782 F.2d 807 (9th Cir. 1986); West Point-Pepperell, Inc. v. Donovan, 689 F.2d 950 (11th Cir. 1982). The United States Court of Appeals for the Seventh Circuit has ruled against OSHA on the point in Donovan v. Fall River Foundry Co., 712 F.2d 1103 (7th Cir. 1983), but in favor of EPA under the Clean Air Act in CED's, Inc. v. EPA, 735 F.2d 1092 (7th Cir. 1985).

58/ 691 F.2d 1125 (3d Cir. 1982).

59/ 387 U.S. 541 at 544-545.

60/ No. 85-3133 (D.Idaho 1985) *dismissed* 820 F.2d 308 (9th Cir. 1987).

61/ 387 F.2d 849 (3d Cir. 1968).

62/ Andersen v. Maryland, 427 U.S. 463, 474 (1976).

63/ Congress has been less than skillful in drafting entry right provisions and vacillates from time to time between penalizing refusals and not doing so. The real problem seems to be that the theory and practice of warrants is not very well understood by those preparing legislation, regulations, and policies concerning warrants.

64/ *Supra* note 49.

65/ If a possessor is constitutionally privileged to insist upon presentation of a judicially issued warrant before the entry is effected, he cannot simultaneously be penalized for exercising such a privilege even if the exercise of the privilege entails disregarding an administrative order commanding him to allow entry. Accordingly, the difficulty of using unilateral orders to obtain entry should be obvious. *But see* Justice Scalia's views in *Griffin v. Wisconsin* set forth in note 8, *supra*.

66/ Unpublished (E.D. Pa. 1984).

67/ 401 U.S. 402 (1971).

68/ 436 U.S. 547 (1978).

69/ In the 1986 amendments to CERCLA, entries of BPP premises by EPA are authorized to EPA in section 104(e)(3)(D), which says that at reasonable times EPA is authorized to enter any vessel, facility, establishment, or other place or property where entry is needed to determine the need for response or the appropriate response or to effectuate a response action under CERCLA.

70/ The All Writs Act enables a federal court to craft whatever type of order the case requires so long as no constitutional provision is violated. *See* United States v. N.Y. Tel. Corp., 434 U.S. 159 172 (1977), where the telephone company was doing far more than merely furnishing the government with evidence. There the court authorized government officials to designate some equipment of the bystander telephone company and have tracing equipment appended. It commanded the telephone company not only to allow that, but to furnish the manpower and expertise to accomplish it. *See* Adams v. United States *ex rel.* McCann, 317 U.S. 269, 273 (1942).

71/ *See* Plum Creek Lumber Co. v. Hutton, 608 F.2d 1283 (9th Cir. 1979), and 58 A.L.R. Fed. 704.

IN THE UNITED STATES COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN THE MATTER OF	)	NO.
	)	
THE SHERWIN-WILLIAMS COMPANY, INC. SOUTH CHICAGO PLANT CHICAGO, ILLINOIS	)	APPLICATION FOR WARRANT FOR ENTRY AND INVESTIGATION PURSUANT TO THE RESOURCE CONSERVATION AND RECOVERY ACT, AS AMENDED, 42 U.S.C. §6927, SECTION 308 OF THE CLEAN WATER ACT, AS AMENDED, 33 U.S.C. §1318, SECTION 114 OF THE CLEAN AIR ACT, AS AMENDED, 42 U.S.C. §7414, AND SECTION 11 OF THE TOXIC SUBSTANCES CONTROL ACT, AS AMENDED, 15 U.S.C. §2610

The United States of America, on behalf of the United States Environmental Protection Agency ("U.S. EPA"), by , United States Attorney for the Northern District of Illinois, applies to this Court for a warrant authorizing U.S. EPA officials, and their assistants, contractors, and other subordinates, to enter upon land owned and in the possession of the Sherwin-Williams Company, Inc. located at 11541 South Champlain Avenue, Chicago, Illinois, hereinafter referred to as "the premises," and undertake thereon such inspection and sampling activities as necessary to investigate releases or possible releases of hazardous substances and to determine the compliance of the Sherwin-Williams Company, Inc., with the Resource Conservation and Recovery Act, the Clean Water Act, the Clean Air Act, the Toxic Substances Control Act, as cited above.

The U.S. EPA submits this application pursuant to 42 U.S.C. §§6927, et seq., as amended, 15 U.S.C. §2601, et seq., as amended, 33 U.S.C. §1251, et seq., as amended, 42 U.S.C. §7401, et seq., as amended, and alleges upon information and belief as follows:

(A) The U.S. EPA's authority to inspect and obtain samples to determine compliance with hazardous waste disposal regulations is found in Section 3007(a) of RCRA, 42 U.S.C. §6927(a), which reads:

> (a) Access Entry - For purposes of developing or assisting in the development of any regulation or enforcing the provisions of this title, any person who generates, stores, treats, transports, disposes of, or otherwise handles or has handled hazardous wastes shall, upon the request of any officer, employee, or representative of the Environmental Protection agency, duly designated by the Administrator, or upon the request of any duly designated officer, employee or representative of a State having an authorized hazardous waste program, furnish information relating to such wastes and permit such person at all reasonable times to have access to, and to copy all records relating to such wastes. For the purposes of developing or assisting in the development of any regulation or enforcing the provisions of this title, such officers, employees or representatives are authorized--
>
> 1. to enter at reasonable times any establishment or other place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from;
>
> 2. to inspect and obtain samples from any person of any such wastes and samples of any containers or labeling for such wastes.
>
> Each such inspection shall be commenced and completed with reasonable promptness. If the officer, employee or representative obtains any samples, prior to leaving the premises, he shall give to the owner, operator, or agent in charge a receipt describing the sample contained and if requested a portion of each such sample, equal in volume or weight to the portion retained. If any analysis is made of such samples, a copy of the results of such analysis shall be furnished promptly to the owner, operator or agent in charge.

Pursuant to Section 3007 of RCRA, then, officers, employees and representatives of U.S. EPA and the State are authorized to enter any place where hazardous wastes are or have been generated, stored, treated, disposed of, or transported from in order to inspect and obtain samples from any person of any hazardous wastes for the purpose of enforcing the provisions of the Act.

B. The Sherwin-Williams Company, Inc. owns and operates a facility in Chicago, Illinois. This facility is a "place where hazardous wastes are or have been generated, stored, disposed of or transported from." (Affidavit at Paragraph). The U.S. EPA is investigating whether Sherwin-Wiliams is complying with applicable RCRA regulations.

C. The U.S. EPA's authority to inspect and obtain samples to determine compliance with the Clean Water Act is found at 33 U.S.C. §1318(B) which reads:

> (b) the Administrator or his authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of his credentials --
>
> > (i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and
> >
> > (ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required clause (A), and sample any effluents which the owner or operator of any such source is required to sample under such clause.

Therefore, pursuant to Section 1318 of the CWA,

officers, employees and representatives of U.S. EPA and the State are authorized to enter any place where records required to be maintained under the CWA for purposes of copying those records and access to sample and inspect monitoring equipment, methods and effluents for the purposes of enforcing the CWA.

D. The Sherwin-Williams Company, Inc. facility in Chicago, Illinois, is required by law to comply with [among others] the federal pretreatment regulations of the Clean Water Act, 33 U.S. C. § 1317. (Staniec Affidavit at Paragraph). The U.S. EPA is investigating whether Sherwin-Wiliams is complying with applicable CWA regulations, including, but not limited to, federally enforceable pretreatment regulations.

E. The U.S. EPA's authority to inspect and obtain samples to determine compliance with the Clean Air Act is found at Section 114 of the Clean Air Act, as amended, 42 U.S.C. §7414(a) which reads:

> (a) Authority of administrator and authorized representative
>
> For the purpose (i) of developing or assisting in the development of any implementation plan under section 7410 or section 7411(d) of this title, any standard of performance under section 7411 of this title, or any emission standard under section 7412 of this title, (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this chapter (except a provision of subchapter II of this chapter with respect to a manufacturer of new motor vehicles or new motor vehicle engines)--
>
> (1) the Administrator may require any person who owns or operates any emission source or who is subject to any requirement of this chapter (other than a manufacturer subject to the provisions of section 7525(c) or 7542 of

> this title) with respect to a provision of subchapter II of this chapter to (A) establish and maintain such records, (B) make such reports, (C) install such monitoring equipment or methods, (D) sample such emissions (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (E) provide such other information as he may reasonably require; and
>
> (2) the Administrator or his authorized representative, upon presentation of his credentials--
>
> (A) shall have a right of entry to, to, upon, or through any premises of such person or in which records required to be maintained under paragraph (1) are located, and
>
> (B) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under paragraph (1), and sample any emissions which such person is required to sample under paragraph (1).

Therefore, pursuant to Section 7414 of the CAA, officers, employees and representatives of U.S. EPA and the State are authorized to enter any place where records required to be maintained under the CAA for purposes of copying those records and access to sample and inspect monitoring equipment, methods and emissions for the purposes of enforcing the CAA.

F. The Sherwin-Williams Company, Inc. facility in Chicago, Illinois, is required by law to comply with the Federal Revisions to the Illinois State Implementatiuon Plan ("FIP"), cite, which implements of the Clean Air Act, U.S.C. § . (Dart Affidavit at Paragraph). The U.S. EPA is investigating whether Sherwin-Williams is complying with the FIP and any other applicable CAA regulations.

G. The U.S. EPA's authority to inspect and obtain samples to determine compliance with the Toxic Substances Control Act is

found at Section 11 of the Toxic Substances Control Act, as amended, 15 U.S.C. §2610, which reads:

(a) In general

For purposes of administering this chapter, the Administrator, and any duly designated representative of the Administrator, may inspect any establishment, facility, or other premises in which chemical substances or mixtures are manufactured, processed, stored, or held before or after their distribution in commerce and any conveyance being used to transport chemical substances, mixtures, or such articles in connection with distribution in commerce. Such an inspection may only be made upon the presentation of appropriate credentials and of a written notice to the owner, operator, or agent in charge of the premises or conveyance to be inspected. A separate notice shall be given for each inspection, but a notice shall not be required for each entry made during the period covered by the inspection. Each such inspection shall be commenced and completed with reasonable promptness and shall be conducted at reasonable times, within reasonable limits, and in a reasonable manner.

(b) Scope

(1) Except as provided in paragraph (2), an inspection conducted under subsection (a) of this section shall extend to all things within the premises or conveyance to be inspected (including records, files, papers, processes, controls, and facilities) bearing on whether the requirements of this chapter applicable to the chemical substances or mixtures within such premises or conveyance have been complied with.

(2) No inspection under subsection (a) of this section shall extend to--

(A) financial data,
(B) sales data (other than shipment data),
(C) pricing data,
(D) personnel data, or
(E) research data (other than data required by this chapter or under a rule promulgated thereunder),

unless the nature and extent of such data are described with reasonable specificity in the written notice required by subsection (a) of this section for such inspection.

Therefore, pursuant to Section 2610 of the TSCA,

officers, employees and representatives of U.S. EPA and the State are authorized to enter any place where records required to be maintained under the TSCA for purposes of copying those records and access to sample and inspect monitoring equipment, methods and emissions for the purposes of enforcing the TSCA.

H. The Sherwin-Williams Company, Inc. facility in Chicago, Illinois, is an "establishment, facility, or other premises in which chemical substances or mixtures are manufactured, processed, stored, or held before or after their distribution in commerce and any conveyance being used to transport chemical substances, mixtures, or such articles in connection with distribution in commerce" and is, therefore, required by law to comply with the Toxic Substances Control Act.[cite] (Bonace Affidavit at Paragraph). The U.S. EPA is investigating whether Sherwin-Williams is complying with applicable provisions of TSCA.

H. U.S. EPA's actions for which this warrant is sought include the following;

1. To bring upon the property for use and to leave upon the property all equipment needed for inspection and sampling.

2.

3. To package and process such samples for analysis at an off-site laboratory.

4. to take any further activity deemed necessary by the U.S. EPA to adequately inspect and sample the facilities as authorized by

I. The facility in question is in on-going business. However, no significant disruption or interference with the business will occur as a result of U.S. EPA activity.

J. (Although the U.S. EPA was, and is, entitled to a warrantless entry upon the site under RCRA, CWA, CAA, TSCA, etc, (and the U.S. EPA does not intend to waive such a legal position by this application), in order to assure peaceful acquiescence by the owner of the site to the U.S. EPA action, the U.S. EPA applies for this warrant.

I. The United States Supreme Court decisions in Camara V. Municipal Court, 387 U.S. 523 (1967) and Marshall v. Barlows, Inc., 437 U.S. 307 (1978), provide ample authority for this Court to issue a warrant where a statute, such as RCRA, CWA, CAA, TSCA, etc confers a right of entry. See also Mobil Oil corp. v. E.P.A., 716 F.2d 1187 (7th Cir. 1983), Bunker Hill v. EPA, 658 F.2d 1280 (9th Cir. 1981) and Accord Public Service Co. of Indiana v. EPA, 509 F. Supp. 720 (S.D. Ind. 1981). The standard for probable cause justifying the issuance of an administrative search warrant, less rigorous than for a search and seizure warrant in a criminal investigation, requires only a showing either of "specific evidence of an existing violation" or "reasonable legislative or administrative standards" for conducting a particular inspection, Marshall v. Barlows, Inc., 437 U.S. 307, 320 (1978). Barlow's reinforced the Court's earlier decision that:

> "For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of

> an existing violation, but also on a showing that reasonable legislative or administrative standards for conducting an inspection that are satisfied with respect to a particular establishment." Camara v. Municipal Court, 387 U.S. 523, 538 (1967).

More recently, the Supreme court stated that "[p}robable cause to issue an administrative warrant exists if reasonable legislative, administrative , or judicially prescribed standards for conducting an inspection are satisfied ...(emphasis added). Michigan v. Clifford, 464 U.S. 287, 294 n.5, 78 L.Ed.2d. 477, 484 n.5 (1984). Therefore, inspections initiated because of legislative or regulatory standards and inspections initiated because of specific evidence are subject to the lower standard. Accord National Standard Company v. Adamkus, 685 F. Supp. 1040 (N.D.Ill. 1988), aff'd, National Standard Company v. Adamkus, F.2d (1989).

J. The U.S. EPA has established the requisite probable cause, and has shown reasonable legislative and administrative standards, satisfying the requirements set forth in Barlow, Camara, Clifford, and National-Standard decisions, supra, to allow for a warrant to issue.

K. In this case, the U.S. EPA has demonstrated that: (1) the U.S. EPA has reason to believe that there are or have been releases of hazardous waste or constituents from solid waste management units (as identified and described by U.S. EPA) at the facilities (Golubski Affidavit at Paragraphs); (2) investigation and sampling is necessary and appropriate to enforce the corrective action provisions of RCRA/HSWA (Golubski Affidavit at Paragraphs); (3) the U.S.EPA has reason to

believe that there are violations of the Clean Water Act, (4) investigation and sampling is necessary and appropriate to enforce the provisions of the Clean Water Act (Golubski Affidavit at Paragraph); (5) the U.S. EPA has reason to believe that there are violations of the Clean Air Act (Dart Affidavit at Paragraph); (6) investigation and sampling is necessary and appropriate to enforce the provisions of the Clean Air Act (Dart Affidavit at Paragraph); (7) the U.S. EPA has reason to believe that there are violations of the Toxic Substances Control Act (Affidavit at Paragraph); (8) investigation is necessary and appropriate to enforce the provisions of TSCA.

L. U.S. EPA estimates that the sampling and inspection can be accomplished in ten (10) working days beginning on January 21, 1992. Access is needed to take samples at that time because the arrangements for inspection, processing and analysis of the samples has already been made with the National Enforcement Investigations Center of the U.S. EPA which is headquartered in Denver, Colorado etc. (Golubski Affidavit at Paragraph).

A form of warrant is attached to this application.

DATED THIS _____ day of January, 1992.

Respectfully submitted,

_____

United States Attorney

Respectfully submitted,

_____

United States Attorney